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No.

In The

Supreme Court of the United States

October Term, 1997

THOMAS A. FULCOMER, Warden State Correctional Institution at Huntingdon,

Petitioner,

vs.

RODERICK HERMAN FREY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), constitutes a new rule of law that, pursuant to *Teague v. Lane*, 489 U.S. 367 (1988), cannot be applied retroactively to award sentencing relief to a state prisoner whose conviction became final before the new rule was announced.

If *Mills* is properly applied retroactively to cases that were final before the decision was announced, whether its rationale requires sentencing relief where, as here, neither the trial court's instructions nor the verdict form explicitly or implicitly advised the jury that it must be unanimous as to the existence of mitigating circumstances and, to the contrary, made clear that unanimity was required only to find aggravating circumstances and to impose a sentence of death.

PARTIES TO THE PROCEEDING

The petitioner is:

Thomas A. Fulcomer, Warden, State Correctional Institution at Huntingdon

The respondent is:

Roderick Herman Frey

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The December 30, 1997, Judgment and Opinion of the United States Court of Appeals for the Third Circuit, Reversing the Order of the District Court is reported at 132 F.3d 916 (3d Cir. 1997), and is reprinted in the Appendix at App. D. The October 17, 1995, order of the District Court denying the petition for writ of habeas corpus is unreported but is reprinted in the Appendix at App. F.

STATEMENT OF JURISDICTION

Petitioner seeks review of the December 30, 1997, order of the United States Court of Appeals for the Third Circuit that reversed the October 17, 1995, judgment of the United States District Court for the Eastern District of Pennsylvania denying habeas corpus relief to respondent, Roderick Herman Frey, a state prisoner sentenced to death. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In 1979, respondent, Roderick Herman Frey, arranged to have Charles Zehring kill his estranged wife, Barbara, for $5,000, which he borrowed from Barbara against the property settlement he expected upon their divorce. Zehring, in turn, hired Richard Heberlig to assist in the murder.

Frey arranged to meet with Barbara early in the morning of November 8, 1979, at the convenience store where she worked. He then provided Zehring with information about her schedule and the route she would likely take to the store. Posing as police officers, Zehring and Heberlig intercepted Barbara. The plan was to beat the woman to unconsciousness and then stage an auto accident. When she did not lose consciousness, the men panicked, and Heberlig shot her in the chest, killing her.

Frey subsequently confessed to the crime. Though he recanted the confession at trial, the jury convicted him of first degree murder. Following a separate penalty hearing, the jury found that the aggravating circumstance of a contract killing outweighed any mitigating circumstances and, on May 15, 1979, sentenced Frey to death.

The conviction and sentence were upheld on direct appeal, *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), and following an unsuccessful collateral proceeding under Pennsylvania's Post Conviction Hearing Act (PCRA), 42 Pa. Cons. Stat. Ann. § 9541, *et seq.* (Purdon 1982). *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265 (1986), *cert. denied*, 481 U.S. 1007 (1987).

Frey then filed a second PCRA petition, raising a variety of issues, including a claim that in the trial court's instructions to the jury at the penalty phase, the jury was not instructed that it could find the existence of a mitigating circumstance by less then a unanimous vote. The Court of Common Pleas denied PCRA relief. The Pennsylvania Supreme Court affirmed. *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989), *cert. denied*, 494 U.S. 1038 (1990).

Frey turned to the federal courts with a habeas corpus petition under 28 U.S.C. § 2254. Upon a finding that counsel

had provided ineffective representation and that the testimony of one Sharon Bowers had been improperly admitted at the penalty phase of the trial, the district court granted the writ, subject to the Commonwealth's right to hold a new sentencing hearing. The Commonwealth appealed. The Third Circuit vacated the district court's order, finding that, while counsel's representation at the penalty hearing was deficient, Frey was not prejudiced in the sense required by *Strickland v. Washington*, 466 U.S. 668 (1984), and, further, that he was not denied due process by the admission of Bowers' testimony. The court remanded for further consideration of other issues Frey had raised. *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992).

On October 17, 1995, after an additional hearing and further briefing, the district court entered an order denying habeas relief (App. E). Frey appealed. The Third Circuit reversed, concluding that the trial court's instructions at the penalty phase were reasonably likely to have led the jury to believe that, in determining the sentence, it could consider only those mitigating circumstances it found unanimously, in violation of Mills. *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997) (App. D). The court denied rehearing and rehearing *en banc* on January 28, 1998. The order directing the Commonwealth to resentence Frey has been stayed pending resolution of this request for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUITS HAVE SPLIT OVER THE QUESTION WHETHER MILLS ANNOUNCED A NEW RULE OF LAW WHICH, PURSUANT TO THIS COURT'S DECISION IN *TEAGUE v. LANE*,[1] CANNOT BE RETROACTIVELY APPLIED TO CASES ON COLLATERAL REVIEW. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE RETROACTIVITY ISSUE, WHICH THE THIRD CIRCUIT DECLINED TO ADDRESS UPON A FINDING THAT THE COMMONWEALTH'S FAILURE TO ASSERT THE TEAGUE BAR CONSTITUTED ITS WAIVER.

Although the Third Circuit found that this case presented the "close and difficult question" of whether this Court's decision in *Mills* amounts to a new rule of law, which, pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) (plurality) cannot be retroactively applied on collateral review, it declined to reach the issue because the Commonwealth — relying on the Third Circuit's earlier decision in *Zettlemover v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), which upheld in the face of a *Mills* challenge virtually identical jury instructions — had not raised the retroactivity argument.

This Court has made clear, however, that "lithe application of *Teague* is a threshold question in a federal habeas case." *Goeke v. Branch*, 514 U.S. 115, 115 S. Ct. 1275, 1276 (1995). *See also Schiro v. Farley*, 510 U.S. 222, 229 (1994) ("*Teague* analysis is ordinarily our first step" in reviewing federal habeas decision). And while the Court has also held that the Teague

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1. 489 U.S. 288 (1989).

question is not jurisdictional and thus may be waived, it has also observed that the Court has discretion to reach a *Teague* argument not preserved in the courts below. *Id.*

This is a case in which the Court should exercise its discretion and grant review to consider whether the *Teague* rule precludes application of *Mills* to cases on collateral review. The Circuits that have addressed the question are split. *Compare Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995) (*Mills* announced a new rule of law that, per *Teague*, could not be applied retroactively on collateral review) and *Nethery v. Collins*, 993 F.2d 1154 (5th Cir. 1993) (same) *with Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992) (*Teague* does not bar retroactive application of *Mills*). *See also Zettlemoyer v. Fulcomer*, 923 F.2d at 306, n.19 (assuming in the absence of a decision from this Court that *Mills* would apply to cases on collateral review); *Frey v. Fulcomer*, 132 F.2d at ___, n.4 (noting the "thoughtful" analysis in *DeShields v. Snyder*, 829 F. Supp. 676 (D. Del. 1993), which concluded that Mills does not announce a new rule).[2]

The absence of a decision from this Court finally resolving the *Teague/Mills* question creates confusion and conflict in the state and lower federal courts, undermines the interest in finality that informs federal habeas jurisdiction, and results in disparate treatment of capital defendants whose juries received virtually identical instructions at penalty hearings occurring well before *Mills*, an outcome that is antithetical to a coherent and respected system of laws. It is a result that would be remedied by the grant of review to finally determine whether *Teague* bars the retroactive application of *Mills* or not. The decision below calls into question, and may require new penalty hearings, in scores

2. The Pennsylvania Supreme Court has held that *Mills* cannot be applied to cases on collateral review. *Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994).

of pre-*Mills* death penalty cases in Pennsylvania alone. Surely, the propriety of applying *Mills* to ancient cases is a question sufficiently significant and far-reaching to warrant its resolution now, despite the failure of the court or the parties to address it below. For this reason alone, review should be granted.

II.

THE DECISION BELOW IN CONTRARY TO, AND CONSTITUTES A MISAPPLICATION OF, THIS COURT'S DECISIONS IN MILLS AND ITS PROGENY. IT IS ALSO CONTRARY TO THE DECISIONS OF OTHER CIRCUITS THAT HAVE HAD OCCASION TO CONSIDER JURY INSTRUCTIONS SIMILAR TO THOSE THAT WERE DELIVERED AT RESPONDENT'S PENALTY HEARING.

The Third Circuit panel determined that the jury charge provided at the penalty phase of respondent's trial was reasonably likely to have led the jurors to believe that, in reaching a penalty verdict, they could consider in mitigation only those mitigating factors they had unanimously found to exist. The court concluded that the instructions thus violated this court's decisions in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), and required that respondent be provided with a new sentencing hearing. The panel's reasoning is flawed, based on a new method of analysis that the court invented especially for this case. The decision is result-oriented and illogical and, calling into question the bulk of Pennsylvania death penalty cases, should be carefully reviewed.

A. The decision below is unreasoned and fatally flawed.

The panel based its ruling on three factors: that the charge improperly "emphasized" the need for unanimous findings, that

the use of the phrase "unanimously find" appeared in too "close proximity" to the phrase "mitigating circumstances," and that the charge was significantly different from instructions previously approved by another Third Circuit panel in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). *Frey v. Fulcomer*, Slip Op. at 16 (App. D, 29a-30a). None of these rationales withstands analysis. The decision is contrary to this Court's pertinent decisions, those of other circuits construing similar instructions, and that of the Third Circuit itself. It is clearly and unequivocally wrong; it should be reviewed and reversed.

First, the fact that the charge repeated the need for unanimity does not remotely violate *Mills*. Of course, the charge discussed the concept of unanimity. The question under *Mills* is unanimity as to what? *Mills* prohibits unanimity to find the **presence** of mitigating circumstances. What the charge here clearly addressed, and what the panel simply missed, **was** unanimity to find the **absence** of mitigating circumstances.

The trial court instructed the jury in pertinent part:

> The Crimes Code provides that the verdict must be a sentence of death **if the jury unanimously finds** at least one aggravating circumstance and **no mitigating circumstance,** or if the jury **unanimously** finds one or more aggravating circumstances which outweigh **any** mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases. (App H, 62a)
>
> * * *
>
> Remember that your verdict must be a sentence of death **if you unanimously find** at least one aggravating circumstances (sic) and **no mitigating**

> **circumstances** or if you **unanimously** find one or more aggravating circumstances which outweigh **any** mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

Frey, Slip Op. at 13-14 (App. H 64a) (emphasis supplied).

Because the trial court used the term "unanimously" four times, the panel concluded that it unduly emphasized unanimity and may have led the jury to believe that it need be unanimous as to mitigating circumstances.[3] The plain words of the charge

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3. The trial court's charge essentially tracked the **language** of Pennsylvania's death penalty statute, 42 Pa. C.S. § 9711(c), which requires the court to instruct the jury, *inter alia*, that: "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in **all** other cases."

Pennsylvania's Suggested Standard Jury Instructions (Criminal) § 15.2502F(1) advises trial courts to instruct capital juries that:

> Your verdict must be a sentence of death if you unanimously find, that is, all of you find, at least one aggravating and no mitigating circumstance or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. If you do not agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment.

Plainly, the charge here was entirely consistent **with**, and indistinguishable from, both the death penalty statute **and** the standard jury instructions, the continued viability of **which are**, by virtue of the panel opinion, seriously in doubt.

belie this analysis: The charge **expressly** states (twice) that, in order to impose a sentence of death, the jury must unanimously find at least one **aggravating** circumstance and **no** mitigating circumstance or that it must unanimously find one or more **aggravating** circumstance(s) that outweigh **any** mitigating circumstances. There is **nothing** in the language of the instruction that directly or implicitly states the jury must be unanimous **to give credit** to any mitigating circumstance. Indeed, it says the **exact opposite:** that the jury must be unanimous as to a finding to no mitigating circumstances in order to impose a death sentence. The meaning of the charge is plain — absent unanimous agreement that no mitigating circumstances exist, the sentence must be life imprisonment. *Thus, if even one juror found a mitigating circumstance, the requirement that the jury unanimously agree there were no mitigating circumstances would be defeated, and the sentence would have to be life imprisonment.*

Only by ignoring the express words of the instruction was the court below able to conclude that the "emphasis" on unanimity somehow made the charge improper under *Mills*. Contrary to the panel's implicit suggestion, unanimity is not a verboten concept in a death penalty proceeding, and unanimity is not prohibited. Rather, it is required as to certain aspects — the ultimate verdict, the finding that aggravated circumstances have been proved, the finding that no mitigating circumstances exist, and the finding that aggravating circumstances outweigh the mitigating ones. Thus, a Pennsylvania jury must be instructed on the concept of unanimity, as the Pennsylvania death penalty statute provides. If the jury paid attention to the charge given here, and it must be presumed to have done so, the "emphasis" on unanimity made clear what had to be found unanimously if the sentence were to be death and that unanimity was not required to find the presence of mitigating factors.

Nor does the "close proximity" of the phrase "if you unanimously find" to the phrase "mitigating circumstances" support the Third Circuit panel's conclusion that the charge in this case violated Mills. Again, the plain English meaning of the instruction defeats the panel's analysis. Indeed, the "close proximity" of the locution "unanimously find" to the phrase "no mitigating circumstance" underscores the sense, and the propriety, of the instruction.

Nonetheless, employing a method of analysis that would require a court passing upon a similar claim to count the words between the terms "unanimous" and "mitigating" in the challenged instruction, and then to determine whether the separation between the terms amounts to one "sound bite" (a prohibited result) or more (a constitutionally acceptable one), the panel concluded that the instruction at issue here was reasonably likely to have misled the jury into thinking it need be unanimous to find mitigating circumstances, because the phrase "unanimously find" was but seven words from the phrase "mitigating circumstances" and thus not sufficiently remote to satisfy *Mills*. *Frey v. Fulcomer*, Slip Op. at 14 (App. D 27a, 28a). Of course, this Court did not count words or "sound bites" to arrive at its decision in *Mills*, nor to petitioner's knowledge has any other court in any published opinion attempted to resolve a *Mills* claim by recourse to modern media jargon. What constitutes a "sound bite" is, of course, not clear — the panel neither defined the phrase nor explained its special relevance here: whether the concept of "sound bite" can have any meaning in the legal analysis of a jury instruction and how a court might go about applying it in any consistent, non-arbitrary fashion certainly remain open to question. The constitutionality of a jury charge simply cannot turn upon this sort of analysis.

What the panel appears to have deduced via the sound bite discussion is that of the ten words starting with "unanimously

find" and ending with "mitigating," the jurors heard only the first two and the last and thus concluded they must find mitigating factors unanimously. There is no basis in English grammar or in any rule of law for this extraordinary determination of what the jury was reasonably likely to have done. The words of the charge are clear and reasonably simple; the phrase in question is relatively short; its syntax is not complex. There is no legitimate or logical ground upon which it can be inferred that the jury was capable of hearing and digesting the phrase "unanimously find" while simultaneously being incapable of hearing and digesting the phrase "no mitigating circumstances," or that it was reasonably likely that the jury just ignored the word "no" altogether and gave the entire phrase exactly the opposite meaning of what the plain words expressed. Nor is it reasonably likely that adult speakers of English are incapable of following and retaining a twelve-word phrase in its entirety as it is being spoken to them and of comprehending what it means. The panel's proximity analysis is unsupported, linguistic legerdemain that must he read as an inappropriate, result-oriented effort. It should not be permitted to stand or to control the disposition of the literally dozens of cases to which it is already being alleged to apply.

In any event, even if it is improperly assumed that the jury could conceivably have been misled by the spoken word, the verdict slip (reproduced in the Pennsylvania Supreme Court's opinion in *Commonwealth v. Frey*, 520 Pa. 338, 347, 554 A.2d 27, 31 (1989)), was surely sufficient to dispel its confusion, for its layout makes clear that the phrase "found unanimously" modifies these entire phrases: "[a]t least one aggravating circumstance and no mitigating circumstances" and "[o]ne or more aggravating circumstances which outweigh any mitigating circumstances." Like the oral instruction, the verdict slip in no manner indicates that the existence — as opposed to the nonexistence — of mitigating circumstances need have been

found unanimously to figure in the weighing process. The Third Circuit's easy dismissal of the verdict slip as irrelevant to its analysis of what the jury was reasonably likely to have understood its deliberative process to require is insupportable.

The panel's final reason for rejecting the jury instruction here was that it bore "a significant and distinguishing dissimilarity" from the charge approved by another Third Circuit panel in *Zettlemover v. Fulcomer*, *supra*, a case that has governed disposition of *Mills* claims in Pennsylvania for over six years. The significant, distinguishing dissimilarity the panel identified is entirely phantasmagorical: In *Zettlemoyer*, the word "unanimously" was separated from the word "mitigating" by sixteen other words, thus avoiding the "proximity" problem by purportedly creating more than one "sound bite." *Frey*, Slip Op. at 15 (App. D 28a). As discussed above, the proximity/sound bite analysis is meaningless — and thus dangerous — as a legal construct. What the panel should have done was analyze the plain meaning of the English sentence structure and words that were used to explain the relevant concept to the jury. Had it done so, it would necessarily have concluded that the *Zettlemover* charge, as a matter of English grammatical structure, is identical to the charge at issue here.[4] Both state that the law requires a sentence of death if the jury unanimously finds an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance(s) outweigh any mitigating

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4. In *Zettlemoyer*, 923 F.2d at 307-08, the trial court charged in pertinent part:

> Under the law, you are obligated by your oath of office to fix the penalty at death **if you unanimously agree and** find beyond a reasonable doubt that there is an aggravating circumstances (sic) and either **no mitigating circumstances** or that the aggravating circumstance outweighs any mitigating circumstances.

circumstances. The *Zettlemoyer* court determined that the charge did not violate Mills, which it found "clearly distinguishable":

> Neither the court nor the verdict sheet stated that the jury must unanimously find **the existence** of particular mitigating circumstances or that the jury could weigh only those mitigating circumstances which it found unanimously.

923 F.2d at 308 (emphasis supplied). So, too, here, neither the court nor the verdict sheet told the jury that it must find or that it could weigh only mitigating circumstances it had found unanimously.[5] Only by engaging in foundationless mental gymnastics was the panel able to conclude to the contrary.[6]

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5. The panel below conceded that the verdict slip provided to respondent's jury is "substantially the same" as the verdict slip used in *Zettlemoyer*. *Frey*, Slip Op. at 16 (App. D). Though the *Zettlemoyer* court concluded that the form of the verdict slip cut against Zettlemoyer's argument, 923 F.2d at 308, the panel here reached the opposite conclusion, finding that Pennsylvania's later adoption of a uniform verdict slip that requires the jury to list the mitigating circumstances "found by one or more of us," Pa. R. Crim. P. 358A, amounts to an admission that verdict forms like the one used here and in *Zettlemoyer* contained a fatal flaw that violated *Mills*. *Frey*, Slip Op. at 17-18 (App. 19-20). This is entirely contrary to the **express** statement of the Pennsylvania Supreme Court that

> the purpose of Rule 358A is simply to provide statewide uniform sentencing slips in death penalty cases and in no way suggests that the prior sentencing procedures employed in Pennsylvania were improper.

Commonwealth v. Banks, 540 Pa. 143, 153 n.9, 656 A.2d 467, 472 n.9 (1995).

6. For example, in addition to the "sound bite" analysis, the (Cont'd)

The panel's appropriation of the "sound bite" concept in lieu of genuine legal analysis and its attempt to distinguish the charge from its own precedent in *Zettlemoyer* is baseless.

(Cont'd)
panel suggested that the *Zettlemoyer* charge was upheld only because its phraseology would have been reasonably likely to have been understood to mean:

> [Y]ou must fix the penalty at death if you unanimously agree to the ultimate conclusion that either there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs any mitigating circumstances.

Frey, Slip Op. at 12 (App. D). How this differs in English meaning from the charge Frey received — that the penalty must be death "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . . or one or more aggravating circumstances which outweigh any mitigating circumstances" — is entirely unclear. Both instructions tell the jury that what the panel called the "ultimate conclusion"— "an aggravating circumstance and no mitigating circumstance or an aggravating circumstance that outweighs any mitigating circumstance" — must be unanimous. Surely, the *Zettlemoyer* charge cannot be distinguished, as the panel attempted to do, because it used the phrase "agree and find" rather than just the word "find." In context, the phrase and the word have the same meaning and tell the jury the same thing. Contrary to the panel's discussion, the *Zettlemoyer* charge was not saved by use of the word "agree," and absence of the term does not defeat the charge here. Like the charge in *Zettlemoyer*, this charge did not tell the jury "that each interim step in its deliberations must be unanimous," *Zettlemoyer*, 923 F.2d 308, only that its "ultimate conclusion" must be. "That the jury must unanimously agree [find] that the aggravating must outweigh the mitigating is not the same as unanimously agreeing [finding] that a mitigating factor exists." *Id.*

B. The panel opinion misapplies this Court's Decisions in *Mills*, *McKoy*, and *Boyde*.[7]

In *Mills*, this Court found that Maryland's capital sentencing procedure improperly precluded the sentencer from considering mitigating circumstances. In the Maryland procedure, the jury was to consider mitigating circumstances on a verdict form, and was instructed to write "yes" next to those it **unanimously** concluded were proved by a preponderance of the evidence. Otherwise, the jury was instructed to write "no" on the form next to a particular circumstance. A lack of unanimity would produce a "no" result and preclude consideration of any given mitigating circumstance so disposed of, permitting a single juror to "veto" any and all mitigating circumstances and preclude their consideration against aggravating circumstances in a weighing process.

Here, as discussed above, the charge provided to respondent's jury did not instruct that the jurors had to be unanimous in finding mitigating circumstances. On the contrary, the court charged that the jury had to be unanimous in finding **no** mitigating circumstances. Where the Maryland instructions explicitly required a unanimous "yes" in order to qualify a mitigating factor for the weighing stage, the instructions here required the weighing of "any" mitigating circumstance. Where Maryland required a finding of "no" mitigating circumstances from a **failure** to be unanimous, the instructions here required unanimity in order to find that there were **no** mitigating circumstances. In the absence of such a finding, a weighing process was required. The procedure outlined in the instructions here did not resemble Maryland's; it was its polar opposite. The attempt of the lower court to find a *Mills* violation in the

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7. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990); and *Boyde v. California*, 494 U.S. 370 (1990).

instructions in this case represents an insupportable and unwarranted misapplication of *Mills* that surely cannot be permitted to stand.

Nor, of course, do the instructions at issue here bear any relationship to the flaws this Court found in *McKoy*, in which the capital sentencing scheme, as well as the instructions and verdict slip provided to the jury, all **expressly** required the jurors to unanimously agree as to **the existence** of any mitigating circumstance before the circumstance could be considered in arriving at the penalty. Here, the jury was never told, directly or indirectly, that it must find mitigating circumstances unanimously; it was told the opposite — that it must unanimously find **no** mitigating circumstances. To the extent that the panel relied on *McKoy* as additional support for its result, its reliance was clearly and wholly erroneous.

In *Boyde*, this Court clarified the standard for assessing a jury instruction that, as here, is allegedly ambiguous and therefore subject to an erroneous interpretation:

> We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

494 U.S. at 380. The Court cautioned that "a capital proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition." *Id.* Here, as discussed above, it is difficult to see how there was **any** possibility that **any** juror, let alone the entire jury, understood the trial court's instruction to mean that the jurors must be unanimous to find the presence of mitigating circumstances. Certainly, if the jurors understood the English language, there is no **reasonable**

possibility that they believed they were precluded from weighing mitigating factors not found unanimously. While the panel purported to apply *Boyde's* "reasonable possibility" test, it in fact engaged in the search "for subtle shades of meaning" and "speculation" that *Boyde* eschews. 494 U.S. at 380-81.

The panel's opinion is inconsistent with and misapplies the *Boyde* standard, as well as the substantive holdings of *Mills* and *McKoy*. It is, moreover, incompatible with the decisions of other Circuits that have construed similar instructions and rejected claims of error based on *Mills* and *McCoy*. *E.g.*, *Griffin v. Delo*, 33 F.2d 895, 905-06 (8th Cir. 1994) (instructions that jury must unanimously find that mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1208 (1994) (same: court charged, as here, that jury must unanimously find that aggravating circumstance outweighed "any" mitigating circumstance); *Maynard v. Dixon*, 943 F.2d 407, 418-420 (4th Cir. 1991); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-1121 (6th Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991) (same; court charged that jury must be unanimous in finding any aggravating circumstance but was silent on how many jurors had to find any mitigating circumstance). *See also DeSheilds v. Snyder*, 829 F. Supp. at 688-89 (court's instruction that jury must unanimously find that aggravating circumstances outweighed any mitigating circumstances did not suggest unanimity as to mitigation and did not violate *Mills*).

Because the decision below is at odds with, and is a wholly unwarranted extension of, *Mills* and *McCoy*, it should be reviewed by writ of certiorari and reversed.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

JOHN A. KENNEFF*
First Assistant District Attorney
JOSEPH C. MADENSPACHER
District Attorney
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Attorneys for Petitioner

* *Counsel of Record*

APPENDIX A — ORDER AND STIPULATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MARCH 10, 1998

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 89-4248

RODERICK HERMAN FREY,

Petitioner

vs.

THOMAS A. FULCOMER, Warden State Correctional Institution at Huntingdon,

Respondent

ORDER

AND NOW, this 9th day of March, 1998, the annexed Stipulation having been entered into by and between Roderick Herman Frey, by his Attorney, Penn B. Glazier, Esquire, and Thomas A. Fulcomer, by John A. Kenneff, Esquire, for the Office of the Lancaster County District Attorney, the Court hereby ORDERS as follows:

1) The order of this Court entered on February 19, 1998, in the above captioned case, shall be STAYED conditionally, provided that Thomas A. Fulcomer files with the Supreme Court of the United States a Petition for Writ of Certiorari on or before March 27, 1998.

2) The stay shall remain in full force and effect until either:

a) The denial of the Petition for Writ of Certiorari, or

b) The Supreme Court of the United States affirms the decision of the United States Court of Appeals for the Third Circuit.

3) If the Supreme Court of the United States denies the Petition for Writ of Certiorari, then Roderick Herman Frey shall be sentenced to life imprisonment within one hundred twenty (120) days after such denial of the Petition for Writ of Certiorari.

4) If the Supreme Court of the United States grants the Petition for Writ of Certiorari, but then affirms the decision of the United States Court of Appeals for the Third Circuit, Roderick Herman Frey shall be sentenced to life imprisonment within one hundred twenty (120) days after such affirmance.

5) If the Supreme Court of the United States remands the case to the United States Court of Appeals, the order entered February 19, 1998 shall remain stayed until further order of a court of competent jurisdiction, either on its own motion or upon petition of either party.

6) In no event shall the Attorney for the Commonwealth conduct a new penalty hearing.

7) The annexed Stipulation shall be binding on the parties in any proceeding, in any court of competent jurisdiction.

BY THE COURT:

s/ John P. Fullam
John P. Fullam, Senior Judge

Appendix A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 89-4248

RODERICK HERMAN FREY,

Petitioner

vs.

THOMAS A. FULCOMER, Warden State Correctional Institution at Huntingdon,

Respondent

STIPULATION

This Stipulation is entered into this 5th day of March, 1998, by and between Roderick Herman Frey, by his Attorney, Penn B. Glazier, Esquire, and Thomas A. Fulcomer, by John A. Kenneff, Esquire, for the Office of the Lancaster County District Attorney.

WHEREAS, in the case of Roderick Herman Frey vs. Thomas A. Fulcomer, No. 95-9007, the United States Court of Appeals for the Third Circuit, on December 30, 1997, reversed the order of the District Court, with instructions to grant the writ of habeas corpus conditionally, with the proviso that Pennsylvania shall, within 120 days, conduct a new sentencing hearing or sentence Roderick Herman Frey to life imprisonment; and

Appendix A

WHEREAS, on February 19, 1998, the Honorable John P. Fullam, senior judge of the United States District Court for the Eastern District of Pennsylvania, granted the writ of habeas corpus with the aforementioned condition and proviso;

The parties hereto STIPULATE AND AGREE as follows:

1) The order of the Honorable John P. Fullam, senior judge of the United States District Court for the Eastern District of Pennsylvania, entered in the above stated matter on February 19, 1998, shall be STAYED conditionally, provided that Thomas A. Fulcomer files with the Supreme Court of the United States a Petition for Writ of Certiorari on or before March 27, 1998.

2) The stay shall remain in full force and effect until either:

a) The denial of the Petition for Writ of Certiorari, or

b) The Supreme Court of the United States affirms the decision of the United States Court of Appeals for the Third Circuit.

3) If the Supreme Court of the United States denies the Petition for Writ of Certiorari, then Roderick Herman Frey shall be sentenced to life imprisonment within one hundred twenty (120) days after such denial of the Petition for Writ of Certiorari.

4) If the Supreme Court of the United States grants the Petition for Writ of Certiorari, but then affirms the decision of the United States Court of Appeals for the Third Circuit, Roderick Herman Frey shall be sentenced to life imprisonment within one hundred twenty (120) days after such affirmance.

5) If the Supreme Court of the United States remands the case to the United States Court of Appeals, the order entered February 19, 1998 shall remain stayed until further order of a court of competent jurisdiction, either on its own motion or upon petition of either party.

6) Provided that the stay stipulated to herein is ordered, then in no event shall the Attorney for the Commonwealth conduct a new penalty hearing.

7) This stipulation shall be binding on the parties in any proceeding, in any court of competent jurisdiction.

s/ John A. Kenneff
John A. Kenneff, Esquire
Office of the Lancaster County District Attorney
50 North Duke Street
Lancaster, PA 17602-2805
(Attorney for Thomas A. Fulcomer)

s/ Penn B. Glazier
Penn B. Glazier, Esquire
625 West Chestnut Street
P.O. Box 1387
Lancaster, PA 17608-1387
(Attorney for Roderick Herman Frey)

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 18, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 89-4248

RODERICK HERMAN FREY

v.

THOMAS A. FULCOMER, Warden, State Correctional Institution at Huntingdon

ORDER

AND NOW, this 18th day of February, 1998, In compliance with the mandate of the United States Court of Appeals for the Third Circuit, IT IS ORDERED:

The petition of Roderick Herman Frey for a writ of habeas corpus is CONDITIONALLY GRANTED, and he is to be discharged from custody unless, within 120 days, he is either sentenced to life imprisonment, or accorded a new sentencing hearing, conducted in conformity with the views expressed by the Court of Appeals in its opinion dated December 30, 1997, as well as its earlier opinion in *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992), and at which sentencing hearing he is accorded all of the rights and protections to which he is entitled under the United States Constitution.

Appendix B

s/ John P. Fullam, Sr.
John P. Fullam, Sr. J.

[stamped]
ENTERED: 2-19-98
CLERK OF COURT

APPENDIX C — SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC DATED JANUARY 29, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-9007

RODERICK HERMAN FREY

Appellant

v.

THOMAS A. FULCOMER, Warden, State Correctional Institution at Huntingdon

(D.C. Civ. No. 89-cv-04248)

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, RENDELL, *Circuit Judges*,

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in bane, the petition for rehearing is DENIED. Judge Greenberg would grant rehearing.

Appendix C

BY THE COURT

s/ John R. Becker
Circuit Judge

DATED: 1/29/98

APPENDIX D — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 30, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-9007

RODERICK HERMAN FREY

Appellant

v.

THOMAS A. FULCOMER, Warden State Correctional Institution at Huntingdon

On Appeal From the United States District Court For the Eastern District of Pennsylvania
(D.C. Civ. No. 89-cv-04248)

Present: Becker, Roth, and McKee, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District court for the Eastern District of Pennsylvania and was argued by counsel on December 17, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 18, 1995, be, and the same is hereby reversed and the cause is remanded to the District Court with direction to grant the writ of habeas corpus conditionally, with

the proviso that Pennsylvania shall, within 120 days, conduct a new sentencing hearing in a manner not inconsistent with the opinion of this Court, or sentence Mr. Frey to life imprisonment. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ P. Douglas Sisk
Clerk

Dated: 30 December 1997

Appendix D

Filed December 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-9007

RODERICK HERMAN FREY

Appellant

v.

THOMAS A. FULCOMER, Warden State Correctional Institution at Huntingdon

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 89-cv-04248)

Argued: December 17, 1996

Before: BECKER, ROTH, and McKEE, Circuit Judges.

(Filed December 30, 1997)

* * *

OPINION OF THE COURT

BECKER, Circuit Judge.

This is an appeal by Roderick Frey, who was convicted by a Pennsylvania state court jury of murder in the first degree and

was sentenced to death, from a final order of the district court denying his petition for a writ of habeas corpus. Frey's appeal requires us to consider whether the jury charge at the penalty phase of his trial violated the Eighth Amendment as construed in Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990). These cases hold that a death sentence should be vacated if the jury, upon receiving the judge's instructions, may have thought that it could only consider those mitigating factors which it unanimously found to exist. Because we conclude that the charge was reasonably likely to have had that effect, we will reverse the order of the district court and direct it to grant a conditional writ of habeas corpus permitting Pennsylvania to conduct a new sentencing proceeding or to sentence Frey to life imprisonment.

I. Facts and Procedural History

The following are the basic background facts. A fuller factual history is set forth in our opinion on Frey's previous appeal on different issues, see Frey v. Fulcomer, 974 F.2d 348, 351–56 (3d Cir. 1992) ("Frey I").

Roderick and Barbara Frey were married in 1956. By 1979, they were experiencing difficulty in their marriage and spoke of divorce. Financial difficulties and the death of their son in an automobile accident two years earlier had contributed to their marital discord. Frey apparently also had engaged in extramarital affairs. Frey worked as a truck driver for the Turkey Hill dairy chain. His job brought him into contact with Charles Zehring, the manager of a Turkey Hill convenience store, whom the Pennsylvania Supreme Court later described as suffering from mental illnesses, including paranoid schizophrenia. See Commonwealth v. Frey, 475 A.2d 700, 702 (1984). By mid-

1979, Frey had begun discussing with Zehring his marital difficulties, as well as his concerns about the financial strain that would be caused by a divorce. Zehring suggested as a solution that Frey arrange to have Mrs. Frey killed in a manner that made her death appear accidental.

In October 1979, Barbara Frey sued Frey for divorce, and he moved out of their home. Around the same time, Frey and Zehring finalized an arrangement whereby Frey agreed to pay Zehring five thousand dollars to kill his wife. Frey financed the deal by borrowing the money from Barbara against their expected property settlement.

On November 8, 1979, Frey arranged to meet Barbara early in the morning at the Turkey Hill convenience store where she worked. Frey then passed along information to Zehring about her schedule and likely route to the store. In the meantime, Zehring, in exchange for five hundred dollars, enlisted the assistance of Richard Heberlig. Though Heberlig was initially led to believe that he would only be assaulting the intended victim, he became aware, on the morning of November 8, that murder was in fact planned.

Zehring and Heberlig set out at four a.m. on November 8 to locate and kill Barbara Frey. Posing as police officers, they pulled her car over to the side of the road and approached her. Their plan at that point was to beat Mrs. Frey into unconsciousness and then state an auto accident as their cover. When she did not lose consciousness, Heberlig panicked and shot her in the chest. After the shooting, they moved Mrs. Frey's car to a nearby field where they failed in an attempt to set the car on fire. Frey subsequently paid Zehring the balance of the money he owed for the contract killing.

Appendix D

Barbara Frey's body was discovered by a passerby later that morning. On December 6, 1979, Frey confessed to the murder. Zehring and Heberlig were subsequently arrested and all three men were charged with murder and conspiracy. Zehring and Heberlig pled guilty and received sentences of life imprisonment.

Despite an earlier confession, which he later recanted, Frey opted to stand trial before a jury. The defense called as a witness a psychologist who testified to Frey's low-to-normal IQ, his basically submissive personality, his minimal tendency to defend himself, and his risk averse nature. The defense proceeded to argue that Zehring had threatened Frey, and that Frey had paid Zehring the five thousand dollars as extortion money in an effort to protect his family. The jury was apparently unconvinced by the story, for it found Frey guilty of murder in the first degree.

A sentencing hearing followed immediately. After counsel for both Frey and the Commonwealth had presented their arguments, the court instructed the jurors on how they were to assess the evidence before them in order to decide whether Frey was to be sentenced to life imprisonment or to death. Part of that deliberative process involved consideration of the aggravating and mitigating circumstances in Frey's case, and the state trial judge gave the following instruction:

> [T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

App. at 286.

The judge then told the jury that there was only one relevant aggravating circumstance (contract murder) but that there were six possible mitigating circumstances: Frey's lack of prior convictions; the influence of mental disturbance; impairment of the ability to appreciate the criminality of the act; youth or advanced age; duress or substantial domination by another person; and any other circumstances that they, as jurors, would consider relevant. Finally, the judge instructed the jury that the Commonwealth must prove aggravating circumstances beyond a reasonable doubt, but that the defense need only prove mitigating circumstances by a preponderance of the evidence.

On May 15, 1989, after five and one-half hours of deliberation, the jury returned a sentence of death. Following his sentencing, Frey retained new counsel and appealed his conviction and sentence to the Pennsylvania Supreme Court, which affirmed. See Commonwealth v. Frey, 475 A.2d 700 (1984). In that appeal Frey raised several arguments, including a claim that his sentence was disproportionate relative to the life sentences given to his accomplices. The Pennsylvania Supreme Court held that the cases of Zehring and Heberlig were not "similar" for purposes of the proportionality review required by 42 Pa. Cons. Stat. Ann. S 9711(h)(3)(iii)(Purdon 1982).

In July 1984, Frey petitioned for relief under Pennsylvania's Post Conviction Hearing Act, 42 Pa. Cons. Stat. Ann. S 9543(3)(xiii) (Purdon 1982) alleging exculpatory after-discovered evidence — statements made by Zehring while in prison evidencing Zehring's domination of Frey. The Court of Common Pleas denied Frey's motion, and the Pennsylvania Supreme Court affirmed. See Commonwealth v. Frey, 517 A.2d 1265 (1986). The Supreme Court held that Frey could have

elicited this evidence during the guilt phase of the trial, and, at all events, that a different verdict was unlikely.

Frey again petitioned under Pennsylvania's Post Conviction Hearing Act on various other theories, including ineffective assistance of counsel. Both the Court of Common Pleas and the Pennsylvania Supreme Court rejected Frey's claims, holding, inter alia, that Frey had suffered no prejudice from his counsel's failure to accurately state the law regarding mitigating circumstances to the jury at sentencing. See Commonwealth v. Frey, 554 A.2d 27 (1989). In this petition Frey also contended that the jury charge at the penalty phase of his trial violated Mills. This argument was also rejected. See 554 A.2d at 30–31.

His state court remedies exhausted, Frey then turned to federal court. In March 1991, he filed a petition for a writ of habeas corpus, 28 U.S.C. S 2254 (1988), in the District Court for the Eastern District of Pennsylvania. Although the district court denied the petition with respect to all guilt phase issues, it found that Frey had received ineffective assistance of counsel at the penalty phase and was prejudiced thereby, and that the court had improperly admitted certain testimony at that stage of the proceedings as well.[1] Accordingly, the district court granted Frey a writ of habeas corpus, without prejudice to the Commonwealth's right to resentence Frey to life imprisonment, or alternatively, to conduct further proceedings.

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1. The testimony at issue involved Sharon Bowers, an acquaintance of Frey's. Although not appearing at the guilt phase of the trial, Bowers testified at the sentencing phase that Frey complained often of his problems with Mrs. Frey, and that on one occasion in May or June of 1979 Frey told Bowers that "I would kill the son of a bitch [sic] if I knew I could get away with it."

Appendix D

The Commonwealth appealed to this court, and on July 10, 1991, we vacated the district court's grant of habeas corpus relief. See Frey I. We held that although performance of defendant's trial counsel was deficient at the penalty stage, habeas relief was not appropriate under the test of Strickland v. Washington, 466 U.S. 668 (1984), since it was not reasonable probable that the jury would have sentenced Frey to life imprisonment rather than death had Frey been afforded effective assistance of counsel.[2] We also held that Frey was not denied due process by the admission of the Bowers' testimony. We remanded the matter for further reconsideration of other issues raised by Frey's habeas petition. In October 1995, after an additional hearing and supplemental briefing, the district court denied the petition.

Frey now appeals the order of the district court denying his petition for habeas corpus relief, raising a host of legal issues. However, as noted in the margin, only the question whether the jury charge at the penalty phase impermissibly required the jury to unanimously find the existence of mitigating circumstances in violation of the Eighth Amendment warrants

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2. As part of his alleged deficient performance at the penalty phase, Frey's counsel had based his arguments to the jury on a Pennsylvania death penalty statute that had been held unconstitutional three years earlier, largely because the statute improperly instructed the jury as to which aggravating and mitigating factors to consider, as well as how the jury should balance those factors. See id. at 351. Although we stated at that time that the court "carefully" instructed the jury, and that the judge read "proper instructions" on how to weigh the aggravating and mitigating factors, the question whether the jury charge itself violated Mills-McKoy was not before us at that time and thus those earlier remarks are not controlled here.

extended discussion.[3] Our review of this legal issue is plenary. See Frey I. 974 F.2d at 356.

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3. Frey advances four other bases for relief. First, he once again raises an ineffective assistance of counsel claim. We considered this claim in Frey I, and determined that Frey was not prejudiced by the failings of his attorney. See supra note 2. But Frey now argues that O'Neal v. McAninch, __ U.S. __, 115 S. Ct. 992 (1995) creates a new standard for review of ineffective assistance of counsel claims and thus requires this court to reconsider the matter. We find this contention without merit and decline to reconsider Frey's ineffective assistance of counsel claim. In brief, O'Neal does not change the standard applicable to these types of claims; instead, it only requires that when a court is in "grave doubt" about the likely effect of an error on a jury's verdict, that court should not treat that error as harmless. See id. at 994; see also Yohn v. Love, 76 F.3d 5-9. 522 (3d Cir. 1996) (construing O'Neal). Even assuming that this case would trigger an O'Neal analysis, this court did not indicate at any point in its prior opinion that it was in grave doubt about Frey's claim. Indeed, in Frey I we stated that counsel's "shortcomings, though highly unfortunate, have not undermined [our] confidence in the outcome." 974 F.2d at 369 (internal quotations omitted). O'Neal would not command a different result.

Second, Frey argues that the state trial court erred when it failed to instruct the jury that the defendant's age could be considered as a mitigating circumstance, in violation of both 42 Pa. Cons. Stat. S 9711 (c)(4) (Purdon 1982), which provides that age can be a mitigating circumstance, and the Eight Amendment. We find this argument to lack merit, and agree with the Pennsylvania Supreme Court which stated that, whereas youth and old age could be considered a mitigating circumstance, middle age — Frey was 42 at the time he committed the crime — could not. At all events, we note that the jury instructions clearly indicated to the jurors that they could consider any circumstances that they felt were relevant as mitigating evidence.

(Cont'd)

Appendix D

II. The Jury Charge

Frey challenges his sentence on the ground that the jury charge at the penalty phase of his trial violated the Eighth Amendment as construed by the Supreme Court in Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990). More specifically, Frey contends that the charge impermissibly led members of the jury to believe that a particular mitigating circumstances could not be considered unless there was unanimous agreement regarding proof of that circumstance.

The Commonwealth counters that there is "no likelihood that a reasonable juror could have concluded that they were prohibited from considering the mitigating evidence that they found to exist and that was supported by proof of a preponderance of the evidence," and thus, the Commonwealth argues, the trial court's charge did not suffer from the deficiencies animating Mills and McKoy. In addition, the Commonwealth contends that we considered the same issue in

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(Cont'd)

Third, Frey raises a claim regarding the alleged after acquired evidence. He submits that statements made by Zehring after Frey's sentencing was complete constitute after acquired evidence and thus merit a new sentencing hearing. Because we conclude that Frey's death sentence must be vacated and remand the matter for further proceedings, we need not reach this issue. Frey will have the opportunity to offer Zehring's statements as evidence. Should a question of admissibility arise in connection with these statements, that determination will be properly made by the trial court in the first instance.

Finally, Frey challenges the constitutionality of Pennsylvania's proportionality review under the 14th Amendment. For the same reason, we do not reach the merits of this issue. See infra at note 7.

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991), and that our approval of the jury charge in that case should control our decision here.[4]

A. The *Mills-McKoy-Boyde* Standard

Under the Supreme Court's current construction of the Eighth Amendment, the sentencer in a death penalty case must

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4. We note at the outset that Frey's Mill challenge might be subject to the bar on retroactive application of new legal rules to cases on collateral review announced in Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion). Under Teague, a case that announces a new legal rule after the defendant's conviction became final should not be applied retroactively unless the rule falls within one of Teague's narrow exceptions. See also Sawyer v. Smith, 497 U.S. 227 (1990). Whether Teague would bar retroactive application of Mills is a close and difficult question upon which the circuits are split. Compare Williams v. Dixon, 961 F.2d 448, 459 (4th Cir. 1992) (holding that Mills survives Teague bar), with Miller v. Lockhart, 65 F.3d 676, 685–86 (8th Cir. 1995) (holding that Mills challenge is subject to Teague bar), and Nethery v. Collins, 993 F.2d 1154, 1162 (5th Cir. 1993) (same). We have not previously taken a definitive position on this debate. In Zettlemoyer we were confronted with this precise issue; although we decided to reach the merits of the Mills claim in that case, we did not expressly hold whether Mills falls outside the Teague bar. See 923 F.2d at 306 n.19. We also note that the district court for the District of Delaware, in a brief but thoughtful opinion, has concluded that Mills does not announce a "new rule" for Teague purposes. See DeShields v. Snyder, 829 F. Supp. 676–88 (D. Del. 1993) (Farnan, J.).

At all events, we do not reach this issue here, as the Commonwealth has failed to raise it in its brief, and thus we deem the issue waived. See Williams, 961 F.2d at 459 (finding waiver). We therefore proceed to the merits.

be permitted to consider all relevant mitigating evidence that the defendant proffers as counseling less than a sentence of death. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Accordingly, it is well established that the sentencer cannot be *precluded* from considering any such evidence. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings*, 455 U.S. at 114. The source of this preclusion is irrelevant; whether its source is statutory (*Lockett*), the sentencing court (*Eddings*), or an evidentiary ruling (*Skipper*), the result is the same.

In *Mills*, the Supreme Court relied on these precedents to conclude that a death sentence should be vacated if there is a substantial probability that reasonable jurors, upon receiving the judge's instructions and attempting to complete the verdict form based on those instructions, may have thought that they could only consider those mitigating factors which they unanimously found to exist. Put differently, if the jurors were led to believe that they could not each individually consider certain mitigating circumstances because there was not unanimous agreement as to the existence of those circumstances, then "some jurors were prevented from considering factors which may call for a less severe penalty, and petitioner's sentence cannot stand." *Id.* at 376 (internal citations omitted). *See also Zettlemoyer v. Fulcomer*, 923 F.2d 284, 306-07 (1991) (discussing *Mills*).

The "intuitively disturbing" hypothetical scenario which *Mills* precludes is the following: All 12 jurors agree that *some* mitigating circumstances are present, and that those mitigating circumstances outweigh any aggravating circumstances. But since the jury cannot unanimously agree that the *same* mitigating circumstances are present, they would not be permitted to

engage in any deliberation on the appropriateness of death versus life imprisonment. *See Mills*, 486 U.S. at 374. Moreover, since Eighth Amendment jurisprudence requires that each sentencer be permitted to consider all mitigating circumstances, the *Mills* Court did not require proof of actual confusion. The Court reasoned that "[t]he possibility that a single juror could block such consideration [of a mitigating circumstance], and consequently require the jury to impose the death penalty, is one we dare not risk." Id. at 384. Thus, the court required proof of only a substantial probability of confusion on this element of the charge.

Two years later, the Court reaffirmed the importance of Mills in McKoy v. North Carolina, 494 U.S. 433 (1990). In McKoy, the trial court similarly instructed the jury that it must unanimously find the existence of any mitigating circumstances in order to weigh those circumstances in the sentencing determination. Attempting to distinguish itself from the Maryland statute at issue in Mills, North Carolina argued that its death penalty sentencing scheme allowed the jury to recommend life imprisonment even if had found no mitigating circumstances. Id. at 438. The Court determined that this distinction did not cure the constitutional defect. Id. at 439. In sum, the essential holding of Mills-McKoy is simply that one juror cannot prevent the others from giving effect to mitigating evidence, regardless of whether the imposition of a life sentence depends on the existence of such evidence. See id. at 440.

Finally, in 1990, the Court clarified the legal standard for the review of jury instructions when the claim is that the instruction is ambiguous and open to an erroneous interpretation (as was the case in Mills). In Boyde v. California, 494 U.S. 370, 380 (1990), the Court held that the proper standard in

these cases is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." We note that the difference between the standard of review originally outlined in Mills and the standard ultimately adopted in Boyde is not purely semantic. Under the Mills "substantial probability" standard our focus was directed to how a single hypothetical juror might have reacted to the erroneous instruction. Under the Boyde standard, we are told by the Court, our focus should be on the reasonable likelihood that the entire jury applied the instruction in an improper manner. See Boyde, 494 U.S. at 380. Thus, while our inquiry is directed toward whether the Frey instruction suffers from the same type of defect discussed in Mills (i.e. that the instruction could be read to require a unanimous finding of mitigating circumstances), our standard is that of Boyde, not Mills. See Zettlemoyer, 923 F.2d at 307.

B. The Zettlemoyer Charge

We have had occasion to apply the Mills-McKoy-Boyde analysis to a similar case. In Zettlemoyer, supra, we considered the propriety of the following instruction (which we set forth at length for purposes of comparison):

> Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned, . . . that is an aggravating circumstance.
>
> . . .
>
> [Y]ou are obligated by your oath of office to fix the penalty at death if you unanimously agree and find beyond a reasonable doubt that there is an

> aggravating circumstances (sic) and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.

923 F.3d at 307–08. We found that this instruction was not faulty under Mills. See id. at 308. We placed emphasis on the "if you unanimously agree and find" language reproduced above, and reasoned that it meant "only that the jury's ultimate conclusion must be unanimous, not that each interim step in its deliberations be unanimous." Id.

In other words, we found that the word "unanimously" in the latter part of the jury charge only modified the word "agree" in the sense that the instruction was reasonable likely to have been understood by the jury to have meant something akin to: you must fix the penalty at death if you unanimously agree to the ultimate conclusion that either there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs any mitigating circumstances. Accordingly, we concluded that the fact that the jury "must unanimously agree that the aggravating must outweigh the mitigating is not the same as unanimously agreeing that a mitigating factor exists." Id.

This interpretation of the court's "agree and find" language was further suggested by other statements earlier in the Zettlemoyer jury charge. For example, the trial court had previously instructed the jury that:

> If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you

> outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight (sic) the aggravating circumstances, then you must bring in a verdict of life imprisonment.

This instruction basically repeats the information presented to the jury in the instruction discussed above. It is notable, however, that this instruction provides the jury with the same decision calculus without the use of the term "unanimously". Additionally, this instruction refers to aggravating circumstances outweighing "any mitigating circumstances you may find". Taken together, this language supports our conclusion that Zettlemoyer's later use of the term "unanimously" in the jury charge could not be said to support a reasonable likelihood that the jury believed it must unanimously agree on the existence of mitigating circumstances.

C. The Frey Charge

We turn to the jury instruction in the present case. The trial court charged:

> Members of the jury, you must now decide whether this defendant should be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crime Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if

> the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.
>
> . . .
>
> Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstances (sic) and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

App. at 286–89. Although similar in many respects to the charge at issue in Zettlemoyer, there is also a significant and distinguishing dissimilarity here.

As noted above, the determinative question for our purposes is what the jury could have understood the charge to mean, and whether it is reasonably likely that that understanding would have precluded the jurors' independent consideration of any mitigating circumstances. Specifically, we must determine whether it is reasonably likely that the jury could have understood the charge to require unanimity in consideration of mitigating evidence. We need not determine whether the jurors did, in fact, understand the charge to require unanimity in consideration of mitigating evidence — only whether it was reasonably likely. See Boyde, 494 U.S. at 380; Mills, 486 U.S. at 384.

Examining the language of the jury charge, we must answer in the affirmative. First and foremost, read in its entirety, the

relevant portion of the jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to — within seven words of — the mitigating circumstances clause. We rescribe the relevant portion of the sentence: "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances . . . ." Considering this close proximity — the clause is, to the ear and to the mind, one sound bite — it is quite possible that a juror would, regardless of other qualifying language, believe that mitigating had to be found unanimously.

This conclusion is not inconsistent with our holding in *Zettlemoyer* (where the separation was by seventeen words, and not one sound bite). Moreover, as noted above, we found the *Zettlemoyer* instruction to require unanimity in the ultimate conclusion, and not in the interim findings leading to that conclusion. *See Zettlemoyer*, 923 F.2d at 308. This was because the *Zettlemoyer* trial court used the term "unanimously" to modify only the term "agree" in the subsequent phrase "agree and find". In the present cases, the court did not instruct the jury to "fix the penalty at death if you *unanimously agree and find*. . . ," but rather instructed them to so fix that sentence "if the jury *unanimously finds*" (emphasis added). Thus, the unanimity language in the Frey charge could only modify the term "find," and hence the jury could reasonably have believed that unanimity was required in *both* its ultimate and interim conclusions, especially given the close proximity we have described. This possibility, not present in *Zettlemoyer*, violates *Mills*.[5]

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5. Moreover, at no point did the *Frey* state trial judge make a statement clarifying each juror's right to consider mitigating evidence absent the agreement of fellow jurors, a factor noted in

(Cont'd)

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Other parts of the Frey charge were more likely to increase the confusion rather than lessen it. As in *Zettlemoyer*, the Frey trial court made a point of instructing the jury on the relevant burdens of proof relating to both aggravating and mitigating circumstances. The court stated:

> Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. . . . The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. This is a lesser burden of proof that beyond a reasonable doubt . . . . All the evidence from both sides, including the evidence you heard earlier during the trial in chief, as to aggravating or mitigating circumstances, is important and appropriate for you to consider.

App. at 288. It is what is not said here that is significant. Unlike

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(Cont'd)

Kubat v. Thieret, 867 F.2d 351, 373 (7th Cir. 1989) ("Kubat's jurors were never expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed. Robert Kubat would not be sentenced to death."): *see also Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110 (6th Cir. 1990) (en banc) ("Because the jurors in this case were told that aggravating factors had to be unanimous, but were not told exactly what role mitigating factors play, it would have been reasonable for them to assume that mitigating factors had to be found unanimously as well."). While the absence of such an express statement is not dispositive, for such absence was not discussed in *Zettlemoyer* (which post-dated both *Kubat* and *Kordenbrock*), we reference these cases to suggest one means by which the trial court could have clarified its instructions for the jury. The adoption by Pennsylvania of a uniform verdict slip, *see infra* at 17, supports this view.

Zettlemoyer, where the court specifically instructed the jury that aggravating circumstances must be proven "unanimously, beyond a reasonable doubt," the trial court here did not stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements. A lay jury might plausibly conclude, therefore, that aggravating and mitigating circumstances must be discussed and unanimously agreed to, as is typically the case when considering whether a burden of proof has been met. Such an understanding, however, is plainly inconsistent with the requirements of Mills, and adds to our concern that the jury could have understood the charge to require unanimity in consideration of mitigating evidence.

In sum, we find that, in light of the emphasis placed on this charge on unanimous findings, its close proximity to the "mitigating circumstance" language, and the manner in which this charge deviates from the Zettlemoyer charge, it was reasonably likely that the jury could have believed that it was required to find the existence of mitigating circumstances unanimously before those circumstances could be considered in its deliberations. For that reason, the charge violates Mills.

D. The Verdict Slip

The Commonwealth correctly notes in its brief that the verdict slip used in Zettlemoyer was substantially the same as the verdict slip used in the present case. We also recognize that the court's charge in this case tracked the language set forth in that verdict slip. However, as noted above, the text of the charge in Zettlemoyer differed significantly from the one in the present case. Since Zettlemoyer considered the verdict form and the court's instructions as a whole in reaching its decision, see

Zettlemoyer, 923 F.2d at 308 n.22, and since the charge here was significantly different, the discussion in Zettlemoyer regarding the propriety of the verdict slip is not controlling.

Moreover, as we noted in Zettlemoyer, subsequent to Frey's trial Pennsylvania adopted a uniform verdict slip for capital sentencing cases which expressly aims to eliminate the type of ambiguity at issue here. See Pa. R. Crim. P. 358A.[6] While both Mills and Zettlemoyer expressed a hesitancy to "infer too much about the prior verdict form from the . . . well-meant efforts to

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6. The revised instruction provides, in part:

> B. The findings on which the sentence of death is based are (check one);
>
> —1. At least one aggravating circumstance and no mitigating circumstance.
>
> The aggravating circumstance(s) unanimously found (is) (are): . . .
>
> —2. One or more aggravating circumstances which outweigh(s) any mitigating circumstance(s).
>
> The aggravating circumstance(s) unanimously found (is) (are): . . .
>
> The mitigating circumstance(s) found by one or more of us (is) (are):
>
> . . .

Pa. R. Crim. P. 358A (emphasis added).

remove ambiguity from the State's capital sentencing scheme," Mills also noted and inferred from such changes "at least some concern . . . that juries could misunderstand the previous instructions as to unanimity and the consideration of mitigating evidence by individual jurors." Mills, 486 U.S. at 382. Although joint consideration of the constitutionally permissible jury charge and the verdict form in Zettlemoyer led us to the conclusion that the amended form was not necessary to prevent a reasonable likelihood of jury error, such is not the case here. While we express no opinion on the constitutional necessity of any particular amendment to the verdict form, we do believe that the instruction and the verdict form in the present case taken as a whole are insufficient (and that use of the amended form may cure the defect.

E. Conclusion

Though we recognize that the interpretation offered by the Commonwealth is plausible, instructed by the teachings of Mills and its progeny that "[t]he possibility that a single juror could block such consideration [of a mitigating circumstance], and consequently require the jury to impose the death penalty, is one we dare not risk," id. at 384, we conclude that the charge in this case was ambiguous, reasonably likely to confuse the jury, and thus in error. Because we find that the jury could have understood the charge to preclude consideration of mitigating circumstances that were not agreed to by all twelve jurors, and because that creates a risk that the death penalty was imposed in spite of "factors which may call for a less severe penalty," we must direct vacatur of Frey's sentence. See id. at 376. We do so, however, without prejudice to Pennsylvania's right to sentence Frey to life imprisonment or to conduct a new

sentencing hearing in a manner not inconsistent with this opinion.[7]

---

7. As noted supra, Frey also contends that habeas corpus relief is appropriate on the grounds that the Pennsylvania Supreme Court's proportionality review was procedurally and substantively inadequate, and therefore in violation of Frey's due process rights. The Commonwealth rejoins that the proportionality review statute, 42 Pa. Cons. Stat. Ann. § 9711 (h)(3)(iii), does not create any cognizable liberty interest, and therefore cannot ground a due process claim. On this point it relies on Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), and its progeny. In general, the Greenholtz line of decisions stands for the proposition that state-created liberty interests will founder when the state (1) establishes substantive predicates to guide official decisionmaking, and (20 uses explicit mandatory language in its regulations directing the decisionmaker to reach a particular outcome if the substantive predicates are present. See Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461–63 (1989). The Commonwealth maintains that the proportionality review mandated by the Pennsylvania Supreme Court does not meet this standard.

We note, however, that it is uncertain whether the United Sates Supreme Court would follow this approach, or indeed, how it would rule on this issue. Accord Ellis v. District of Columbia, 84 F.3d 1413, 1417 (D.C. Cir. 1996) (noting uncertainty regarding Supreme Court doctrine on state-created liberty interests). This is because the recent decision in Sandin v. Conner, — U.S. —, 115 S. Ct. 2293 (1995), while not overruling any prior cases, see id. at 2300 n.5, sharply criticizes and effectively abandons the Court's prior methodology (as articulated in cases such as Greenholtz) for determining the existence of a statutory liberty interest in the prisoner's rights context. See Ellis, 84 F.3d at 1417–18. Sandin holds that state-created liberty interests will be limited to "freedom from restraint which . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin,

(Cont'd)

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The order of the district court will be reversed with instructions to grant the writ of habeas corpus conditionally, with the proviso that Pennsylvania shall, within 120 days, conduct a new sentencing hearing in a manner not inconsistent with this opinion, or sentence Frey to life imprisonment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(Cont'd)
115 S. Ct. at 2300. While this is undoubtedly a departure from Greenholtz, Thomson, et al., it is unclear exactly how radical a shift the Court intended to spur. See Sandin, 115 s. Ct. at 2306 (Breyer, J., dissenting). And it is still uncertain how broadly this circuit and others will construe Sandin's reasoning.

It seems apparent that Sandin was concerned quite specifically with the problem of prison administration and the interest of the states in the effective control of inmates. Those interests are not at issue here, and so it may be that Sandin's new approach will not apply. See Ellis, 84 F.3d at 1418. Indeed, even the Greenholtz-Thompson line of cases did not directly deal with the type of liberty interest alleged here, and it may be that both Sandin and Greenholtz will prove to be imperfect analogies. At all events, this close and difficult legal problem was not adequately briefed before us, and, since we will vacate Frey's sentence and permit Pennsylvania to conduct a new hearing, and potentially a new proportionality review, we need not reach this issue at this time.

APPENDIX E — MEMORANDUM AND ORDER IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 6, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 89-4248

RODERICK HERMAN FREY

v.

THOMAS A. FULCOMER, Warden, Correctional Institution at Huntingdon

MEMORANDUM AND ORDER

FULLAM, Sr. J. December 5, 1995

On October 17, 1995, I issued a memorandum and order denying petitioner's application for *habeas corpus* relief, in this death-penalty case. The petitioner immediately filed a notice of appeal, but then withdrew the appeal and simultaneously filed, on October 26, 1995, a "motion to alter, amend and make additional findings pursuant to Rule 59 and Rule 52(b) of the Federal Rules of Civil Procedure" and to reconsider the October 17 order. To date, this motion has generated no response, although a member of my staff was given to understand, several days ago, that a belated response would be forthcoming.

In the closing paragraphs of my October 17, 1995 memorandum, I pointed out that an intervening decision of the

Appendix E

United States Supreme Court, *O'Neal v. McAninch*, 115 S. Ct. 992, 130 L. Ed 2d 947, 63 U.S.L.W. 5126 (1995) can be read to cast doubt upon the continuing validity of the rationale of the panel majority in its earlier reversal of this court's ruling, which had granted *habeas* relief to this petitioner. I expressed the view, however, that I was not free to address that question, given the terms of the court of appeals' mandate. Counsel for petitioner have devoted the first nine pages of the motion now before the court to an enthusiastic support of the notion that the court of appeals' decision was wrong, both in light of, and irrespective of the *O'Neal* ruling. Obviously, this court is not the proper forum to consider those arguments.

In my October 17, 1995 memorandum, I stated that "there is no suggestion that this petitioner requested a non-jury trial." Counsel for petitioner now argue that this statement is incorrect. They note that petitioner's trial counsel testified before this court that, before trial, he had conferred separately with the trial judge and with the prosecutor, with a view toward having petitioner plead guilty to murder generally, and having the court determine the penalty non-jury, if his client would be spared the death penalty; but that the prosecutor would not assure him that the death penalty would not be sought, and the trial judge was unwilling to make any commitments as to the actual sentence which would be imposed. As a result, petitioner elected to persist in his plea of not guilty, and go to trial.

As this more detailed narrative demonstrates, the statement that petitioner never sought a non-jury trial is entirely correct: the most that can be said is that petitioner may have expressed a willingness to admit his guilt and have the penalty determined non-jury, if assured in advance that the death penalty was unlikely to be imposed.

Appendix E

While I am perfectly happy to amplify my findings to the extent set forth above, I fail to see how the petitioner's constitutional argument is aided thereby. It is undoubtedly true that, in Lancaster County (and elsewhere, for that matter) persons who plead guilty to murder are less likely to be sentenced to death than persons who are convicted after a trial. This reflects, essentially, the obvious fact that persons assured of a non-capital sentence are more likely to plead guilty; and the further fact that prosecutors are more likely to acquiesce in such dispositions in less egregious cases. Absent some showing of invidious discrimination or arbitrariness, the exercise of prosecutorial discretion in this respect does not violate the Constitution.

I have carefully considered all of the arguments asserted by petitioner in support of the motion for reconsideration but, notwithstanding the failure of the respondent to address the motion, must conclude that none of the issues which I am free to consider warrant granting relief. Petitioner's substantial arguments must be addressed to the court of appeals.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 89-4248

RODERICK HERMAN FREY

v.

THOMAS A. FULCOMER, Warden, Correctional Institution at Huntingdon

ORDER

AND NOW, this 5th day of December, 1995, upon consideration of petitioner's motion for reconsideration ("motion to alter, amend and make additional findings pursuant to Rule 59 and Rule 52(b) of the Federal Rules of Civil Procedure), it is ORDERED:

That the petitioner's motion is DENIED.

There is probable cause for appeal. The stay heretofore granted shall remain in effect, as set forth in this court's order of October 17, 1995

s/ John P. Fullam
Sr. J.

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED OCTOBER 17, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 89-4248

RODERICK HERMAN FREY

v.

THOMAS A. FULCOMER, Warden, Correctional Institution at Huntingdon

MEMORANDUM AND ORDER

FULLAM, Sr.J. OCTOBER 17, 1995

Petitioner in this *habeas corpus* proceeding has been sentenced to death for the murder of his wife. The sentence was upheld on appeal, and all state post-conviction remedies have been exhausted.

When the case was first heard in this court in 1991, I ruled that, although the conviction had been constitutionally obtained, the sentencing portion of the proceeding was tainted with constitutional error. I concluded that petitioner's right to be represented at sentencing by reasonably competent counsel had been infringed (counsel was not aware that the applicable state statute had been declared unconstitutional and had been

amended; he argued the unconstitutional version of the statute to the jury, and therefore argued a less favorable version of one mitigating circumstance, and failed to consider or argue possible other mitigating circumstances). I therefore ruled that the writ should issue, conditioned upon the State's failure to accord a new sentencing hearing within 120 days.

The Commonwealth appealed and, by a two-to-one vote, a panel of the Third Circuit Court of Appeals reversed. Acknowledging that the performance of petitioner's counsel did not measure up to the constitutional standard of reasonable competence, the majority nevertheless concluded that petitioner had not demonstrated prejudice — the second prong of the *Strickland* rubric — because the trial judge's charge, and the district attorney's closing argument, were based upon the correct version of the statute. The panel majority also referred at length to the details of the crime and the unsympathetic role played by petitioner; the opinion can be read as suggesting the unlikelihood that any reasonable jury would have failed to impose the death penalty.

The case was remanded for disposition of other issues which had been asserted by the petitioner, but which I had found it unnecessary to consider. After further evidentiary hearings and briefings, the case is now ripe for decision.

Petitioner contends that his due-process rights were violated when the penalty jury was kept in session for an undue length of time, and its verdict may have been the result of exhaustion rather than deliberation. It is true that, after the guilty verdict was rendered late on a Friday afternoon, the court proceeded immediately to the sentencing phase. The jury retired to deliberate at about 7:30 p.m. and returned the death verdict at

1 a.m. It has been stipulated that, at some point, petitioner's counsel objected and sought to have the trial recessed until the following day, but the request was rejected by the trial judge, on the ground that the jury had not requested any such relief. (Apparently, the court reporter was not available at the time, and the trial transcript does not reflect these events.) While I agree it might have been preferable to recess until the following day, or at least to ascertain the wishes of the jury on that subject, I cannot conclude that petitioner's due process rights were violated. The discretionary decision of the trial judge is certainly entitled to deference; there is no evidence that any juror was impaired or adversely affected by the length of deliberations, and the jury was polled without incident.

Petitioner further argues that, in Lancaster County where this trial occurred, no defendant who pled guilty to murder has ever been sentenced to death, whereas death sentences are fairly frequent in jury trials. Petitioner argues that this "custom and practice" unfairly penalizes defendants who exercise their constitutional right to trial by jury. I do not agree. Absent any indication that all defendants tried by juries receive the death sentence, or that judges are barred by law from imposing death sentences following non-jury trials, no constitutional issue can arise. Moreover, there is no suggestion that this petitioner requested a non-jury trial. And even if petitioner had requested a non-jury trial, and had been refused that option, on the basis of the hypothesis advanced by petitioner it would seem that the net result would be functionally indistinguishable from the prosecutor's decision to seek the death penalty.

Petitioner further argues that the proportionality review ostensibly conducted by the Pennsylvania Supreme Court was meaningless, inadequate, and totally unexplained, and that this

somehow violated petitioner's right to due process of law. Given the minimal constitutional implications of proportionality review in the first place, this challenge cannot be sustained. One may well agree that, so far as the record discloses, the statistics, collected by the Pennsylvania Supreme Court for the alleged purpose of ensuring that the death penalty is not imposed in cases which compare favorably to other cases where the death penalty was not imposed, provide no real basis for comparison. Indeed, petitioner's argument that they are not actually compared in any meaningful way is not entirely refuted, on this record. The fact remains, however, that the Supreme Court of Pennsylvania has adopted a mechanism for analyzing proportionality in death sentence cases, has found that mechanism adequate, and has found that petitioner's death sentence is not disproportionate. It is not the function of a federal district judge to second-guess the merits of the analytical mechanism.

Moreover, hypothetical or theoretical shortcomings in the comparability analysis do not translate into proof that petitioner's sentence is disproportionate. There is no suggestion in the record that a more fully documented and explicated comparability study would have helped this petitioner in the least. Theoretical uncertainties do not demonstrate a due-process violation.

Petitioner next complains that, whereas the applicable Pennsylvania statute lists "the age of the defendant at the time of the crime" as a mitigating factor, the jury in this case was instructed that "the youth or advanced age of the defendant at the time of the crime" could be considered in mitigation. When this discrepancy was argued to the Pennsylvania Supreme Court, that court ruled that it need not address the definitional issue of "age" since, as a matter of law, petitioner's age (42 at the time

of the crime) "can in no way be offered as a factor in mitigation of the seriousness of that crime". 504 Pa. at 441, 475 A.2d at 706.

The correct definition of the mitigating factors listed in the Pennsylvania statute is, obviously, an issue of state law; and the Supreme Court of Pennsylvania is the final decision-maker on such matters. The only issue before this court is whether the United States Constitution precludes limiting the mitigating factor of "age" to the lower and upper ends of the chronological continuum. Plainly, in my view, it does not.

It should also be noted that, in compliance with the statute, the jury in petitioner's case was instructed that it could consider "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense". And petitioner's counsel's closing argument included the following:

> "Let's talk about Mr. Frey.
>
> When we talk about duress, you have to consider the person you are judging first. I am not going to belabor it. You have heard it.
>
> Mr. Frey is 43 years old. He has no prior record. He has children. He has a family. You have seen some of them on the stand. He has worked consistently thorough his entire life. . . ."

On this record, the jury was not actually precluded from considering Mr. Frey's "age" as a mitigating factor, if it chose to do so.

Appendix F

Petitioner mounts a further argument based upon *Mills v. Maryland*, 486 U.S. 368 (1987), which held that a verdict-slip which could reasonably have been interpreted by the jury as requiring a unanimous vote as to each mitigating circumstance, before such mitigation could be considered, was constitutionally impermissible. But I am not persuaded that the verdict-slip in this case can reasonably be so interpreted, particularly when considered in the light of the court's charge.

Although it is true that the verdict-slip specifically required a unanimous finding as to any aggravating circumstances, and did not specifically state that unanimity was not required as to mitigating circumstances, both the verdict slip and the court's charge clearly, and repeatedly, informed the jury that a death verdict was permissible only if the jury unanimously found one or more aggravating circumstances which outweighed any mitigating circumstances. The jury was further instructed that, if they were unable to agree, and if the court determined that further deliberation would not be fruitful, the court would impose a sentence of life imprisonment. Under these instructions, no juror could have felt compelled to join in the vote for a death sentence notwithstanding that juror's belief that a mitigating circumstance found by that juror was not outweighed by the aggravating circumstances. The crucial distinction between this case and *Mills v. Maryland* is that the *Mills* jurors were required to list the mitigating circumstances, as well as the aggravating circumstances, which entered into their balancing decision, and were further specifically instructed that they could not find a mitigating circumstance in the absence of a unanimous vote. I conclude that the form of the verdict slip used in this ease does not provide a basis for *habeas* relief.

Finally, it must be emphasized that, under the terms of the appellate court mandate, this court is now free to consider only

matters which were not addressed in this court's original decision. And, of course, this court is not free to reconsider any issue discussed and resolved by the appellate panel. As discussed above, none of the issues now before this court, alone or in combination, warrants a new sentencing hearing. And, as I understand it, I am not free to consider whether the additional imperfections discussed above, when considered in conjunction with the inadequacies of petitioner's trial counsel at the death penalty phase, would warrant relief. My ruling is limited to the impact of these additional points.

I continue in the belief that petitioner was severely prejudiced at the penalty stage of the trial because the jury was not made aware that the actual triggerman had received a life sentence. Under *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 567 L. Ed 2d 973, 98 S. Ct. 2954 (1978), the jury should have been permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". But I do not believe I am free to grant relief on that basis. Although the majority opinion of the appellate panel seemingly leaves open the question whether the sentence of the co-defendant is a factor which is essential to a valid proportionality review, the appellate panel seems also to have decided that petitioner's trial counsel was not inadequate for failing to attempt to make that information available to the sentencing jury. I believe I am precluded from ruling that petitioner's due process rights were violated by withholding this mitigating factor from the sentencing jury, in view of the appellate decision that trial counsel was not inadequate for failing to attempt the disclosure, or to argue it in mitigation.

Appendix F

Given the court of appeals' earlier ruling in this case, I express no view as to whether the subsequent decision of the United States Supreme Court in *O'Neal v. McAninch*, 115 S. Ct. 992, 130 L. Ed. 2d 947, 63 U.S.L.W. 4126 (1995) may warrant reexamination of the issue of the prejudicial impact of the inadequacies of trial counsel. The Court held that when a federal judge in a habeas proceeding entertains grave doubt as to whether a trial error of constitutional magnitude prejudiced the petitioner, the writ should issue; the petitioner does not have the burden of proving actual prejudice. But this court is, in my view, not warranted in addressing that question.

In view of the previous rulings by the court of appeal in this case, and for the reasons discussed above, the petition must be denied.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 89-4248

RODERICK HERMAN FREY

v.

THOMAS A. FULCOMER, Warden, Correctional Institution at Huntingdon

ORDER

AND NOW, this 17th day of October, 1995, it is ORDERED:

1. The petition of Roderick Herman Frey for a writ of *habeas corpus* is DENIED.

2. The stay of execution previously entered shall remain in effect pending appeal, and until the court of appeals renders its decision, unless otherwise ordered by the court of appeals.

s/ John P. Fullam
Sr. J.

APPENDIX G — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT FILED FEBRUARY 3, 1989

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 81-3-393

COMMONWEALTH OF PENNSYLVANIA

v.

RODERICK HERMAN FREY,

Appellant

Appeal from the Judgment of Sentence of Death of the Court of Common Pleas of Lancaster County, entered on March 20, 1981 at No. 169 of 1980.

ARGUED: September 26, 1988

OPINION OF THE COURT

MR. JUSTICE FLAHERTY FILED: February 3, 1989

On May 14, 1980, Roderick Herman Frey was convicted of murder in the first degree in connection with the contract-murder of his wife. A verdict of death was returned by the jury pursuant to 42 Pa.C.S. § 9711(f). On appeal, the sentence of death was affirmed. *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), cert. denied, 469 U.S. 963 (1984). Subsequently, a motion for a new trial was denied, and, on appeal, the sentence was again affirmed. *Commonwealth*

v. Frey, 512 Pa. 557, 517 A.2d 1265 (1986), cert. denied, ___ U.S. ___ (1987). A warrant for Frey's execution was then issued by the Governor, following which Frey filed a petition for post-conviction relief. The petition and accompanying request for a stay of execution were denied by the court below. The present appeal ensued. On June 9, 1988, this Court granted a stay of execution pending appeal.

The first contention raised by appellant is that statutory authority in this Commonwealth for inflicting the death penalty by means of electrocution is no longer valid. We do not agree. It is to be noted at the outset, however, that the validity of the sentence of death is not tied to the method of imposition. *Commonwealth v. Terry*, 513 Pa. 381, 408, 521 A.2d 398, 412 (1987), cert. denied, ___ U.S. ___ (1987).

The legislature has designated electrocution as the method of execution to be employed in effectuating sentences of death. Act of June 19, 1913, No. 338, P.L. 528, 61 Pa.C.S. §§ 2121-2129 (hereinafter Act of 1913). The Act of 1913 sets forth a comprehensive procedure governing the execution process, beginning with the following provision:

> Every person, his aiders, abettors and counsellors, hereafter convicted of the crime of murder of the first degree, shall be sentenced to suffer death in the manner herein provided, and not otherwise. Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, and the application of such current must be continued until such convict is dead. The said punishment shall be inflicted by the warden or

> deputy warden of the Western Penitentiary, or by such person as the warden shall designate, and shall be inflicted in a building to be erected on the land owned by the Commonwealth. . . .

61 Pa.C.S. § 2121.

Successive sections of the Act of 1913 prescribe transmittal of the trial transcript to the Governor, issuance of a warrant to proceed with the execution, confinement and visitation of the prisoner, observation of the execution, certification of the completed execution, postmortem examination and disposition of the body, and payment of expenses associated with the execution. 61 Pa.C.S. §§ 2122-2128. Finally, in 61 Pa.C.S. § 2129, there appears the following provision:

> This act is intended to furnish a comprehensive and complete method of inflicting the death penalty. If any portion of this act shall be declared invalid or unconstitutional by the Supreme Court of Pennsylvania, the entire act shall thereupon be null and void.

Relying upon this provision, and asserting that the first clause in 61 Pa.C.S. § 2121, supra is a mandatory sentencing provision that this Court has declared unconstitutional, appellant claims that the Act of 1913 is null and void in its entirety. Appellant has failed to bring to our attention, however, any decision in which the Supreme Court of Pennsylvania has addressed any of the provisions of the Act of 1913 and declared them invalid or unconstitutional. Indeed, this Court has never rendered such a decision. Our opinion in *Commonwealth v. Terry*, 513 Pa. at 408, 521 A.2d at 412, insofar as it contained

brief dictum indicating that the Act or 1913 contained a mandatory sentencing provision that had been declared unconstitutional, was lacking in accuracy.

This Court has vacated sentences of death and imposed sentences of life imprisonment in cases where death sentences were imposed under procedural statutes that were violative of the Eighth and Fourteenth Amendments. None of these cases involved the Act of 1913. Rather, most were decided under the Act of June 24, 1939, P.L. 872, § 701, as amended, 18 Pa.C.S. § 4701, a sentencing procedures statute which, although allowing imposition of sentences of either life imprisonment or death in connection with convictions for murder of the first degree, did not meet constitutional standards set forth in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed.2d 346 (1972) (discretion of the sentencing authority must be adequately channeled to avoid arbitrary action). See *Commonwealth v. Dobrolenski*, 460 Pa. 630, 334 A.2d 268 (1975); *Commonwealth v. Martin*, 465 Pa. 134, 348 A.2d 391 (1975), cert denied, 428 U.S. 923 (1976); *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972); *Commonwealth v. Ross*, 449 Pa. 103, 296 A.2d 629 (1972); *Commonwealth v. Sharpe*, 449 Pa. 35, 296 A.2d 519 (1972). Others were decided under section 1311 of the Sentencing Code of 1974, 18 Pa.C.S. § 1311, which, though unconstitutional in itself, had been enacted in an effort to cure the defects in sentencing procedures illuminated by the decision in *Furman*, supra. *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977), cert. denied, 438 U.S. 914 (1978); *Commonwealth v. Davis*, 479 Pa. 274, 388 A.2d 324 (1978). See also *Commonwealth v. McKenna*, 476 Pa. 428, 433-37, 383 A.2d 174, 177-79 (1978) (history of legislative efforts to enact a constitutionally valid sentencing statute). At no time, however, has this Court declared any provision of the Act of 1913 invalid or unconstitutional.

Appendix G

It is clear, of course, that mandatory sentences of death do not meet constitutional standards. *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976); *Commonwealth v. Moody*, 476 Pa. at 232-33, 382 A.2d at 446-47; *Commonwealth v. Cross*, 508 Pa. 322, 333-36, 496 A.2d 1144, 1150-52 (1985). If the language in 61 Pa.C.S. § 2121 were construed as a mandatory sentencing provision, and if it were deemed to be still in effect, we would have no alternative but to declare it unconstitutional.

However, as stated in *Commonwealth v. Terry*, supra, the current sentencing statute, 42 Pa.C.S. § 9711, was enacted to correct constitutional deficiencies in sentencing procedures. The constitutionality of 42 Pa.C.S. § 9711 has been upheld. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), cert. denied, 461 U.S. 970 (1983). Appellant was sentenced in accordance with this statute, rather than under the Act of 1913. Indeed, the Act of 1913 has not been interpreted as a sentencing statute, but rather as a statute which merely defines the method to be utilized for inflicting the death penalty. Prior to the Act of 1913, death sentences were carried out by means of hanging rather than electrocution. As stated in *Commonwealth v. Meyers*, 290 Pa. 573, 585, 139 A. 374 (1927), "The Act of 1913 did nothing more than provide that, in cases where death was fixed as the penalty, the method of executing the sentence should be electrocution." See also 61 Pa.C.S. § 2129, supra ("This act is intended to furnish a comprehensive and complete *method* of inflicting the death penalty." (emphasis added)). Thus, we are not persuaded by appellant's argument that the introductory language contained in the Act of 1913, to wit, the first clause of 61 Pa.C.S. § 2121, supra, insofar as it recites that every person convicted of murder of the first degree shall be sentenced to death, constitutes a

mandatory sentencing provision. As discussed in *Commonwealth v. Meyers*, 290 Pa. at 584-85, 139 A. at ___, this language was merely a prefatory recitation of the penalties existing under another statute at the time the Act of 1913 was adopted.

However, even assuming *arguendo* that the language in question had been construed as a sentencing provision, we would have no occasion to now declare it unconstitutional, since it is no longer in effect. Subsequent sentencing statutes, e.g., 42 Pa.C.S. § 9711, have, by eliminating mandatory sentences of death, clearly supplanted the challenged provision. See 1 Pa.C.S. § 1936 (statute latest in enactment must prevail). In light of these statutory modifications, the Act of 1913 must be read as if amended to state: "Every person convicted of the crime of murder of the first degree, and sentenced to death thereon, shall be executed in the manner herein provided, and not otherwise." This comports, too, with a presumption the legislature would not have enacted valid death penalty sentencing procedures, 42 Pa.C.S. § 9711, without having in place a method for carrying out sentences of death. 1 Pa.C.S. § 1922(1) (presumption legislature does not intend a result that is absurd, impossible of execution, or unreasonable). In short, the legislature has removed the challenged provision from operation prior to there being any occasion for this Court to address its validity. It cannot be said, therefore, that any portion of the Act of 1913 has been, or should be, declared unconstitutional.[1]

The next contention raised by appellant is that the jury instructions and verdict slip employed in the penalty phase of trial must be deemed deficient in light of the recent decision of

1. Mr. Chief Justice Nix files a concurring opinion.

the Supreme Court of the United States in *Mills v. Maryland*, 486 U.S. ___, 100 L. Ed. 2d 384 (1988). This contention is without merit. In *Mills*, the jury instructions and verdict slip utilized at trial contained specific elements of language and form that created a substantial risk of jurors being misled to believe that, unless they agreed unanimously on the existence of any given mitigating circumstance, the circumstance could not be taken into account by any of the jurors during deliberations. 486 U.S. at ___, 100 L. Ed. 2d at 400. The *Mills* decision is simply inapposite to the present case, however, for the jury instructions and verdict slip used in appellant's trial did not contain language similar to that found in *Mills*.

The present instructions did not express a need for unanimity in determining the existence of mitigating circumstances. (N.T. 1388-91). Nor did the form of the verdict slip infer a need for such unanimity.[2] The jury instructions and verdict slip closely followed language in the sentencing statute stating that a unanimous verdict is necessary as to the ultimate decision to impose a sentence of death, 42 Pa.C.S. § 9711(c)(1)(v), but did not state or infer a requirement that any given mitigating circumstance must be unanimously recognized before it can be weighed against aggravating circumstances in reaching a verdict. See 42 Pa.C.S. § 9711(c)(1)(iv) ("[T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances."). Thus, individual jurors were free to weigh whatever mitigating circumstances they perceived, regardless of whether other jurors

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2. Mr. Justice Larsen joins the majority opinion and files a concurring opinion which is joined by Mr. Justice Papadakos.

agreed that those circumstances were established by the evidence. The perceptions of even one juror, alone, with regard to mitigating circumstances, would be sufficient to deny the unanimity required for a sentence of death.

Many of the remaining issues raised in this appeal warrant only brief discussion, for they are clearly lacking in substance. Inasmuch as this is the third time that this Court has been called upon to address appellant's sentence of death on appeal, issues having greater substance have, in the main, been resolved in the earlier appeals.

Appellant contends that the verdict slip employed in the penalty phase of trial was defective in that it did not require the jury to list any mitigating circumstances found. It is already well settled, however, that there is no requirement that mitigating circumstances be listed. *Commonwealth v. Carpenter*, 511 Pa. 429, 444, 515 A.2d 531, 539 (1986).

Appellant asserts that no instruction was given by the court indicating that a sentence of life imprisonment would be imposed if the jury failed to reach a unanimous verdict. This assertion is plainly contradicted by the record. (N.T. 1391).

It is further claimed by appellant that our decision in one of his earlier appeals, *Commonwealth v. Frey*, 504 Pa. at 440-41, 475 A.2d at 706, wherein we held that the fact that appellant was 42 years of age when he committed this crime could not in itself be regarded as a mitigating circumstance, unconstitutionally prevented the jury from considering factors such as "mid-life crisis," "marital discord and tension," and appellant's record of having "lived 42 years without being convicted of any criminal offense." This claim is patently lacking in basis.

Appendix G

Appellant was permitted to introduce evidence of his age at the penalty hearing, and the jury was instructed that the "youth or advanced age" of the defendant could be considered as a mitigating circumstance. The claim of error addressed in his earlier appeal involved a challenge to the court's instruction that the jury could consider the "youth or advanced age" of the defendant, as opposed to simply the defendant's "age." We held, in essence, that there is nothing inherently mitigating about the age of 42 that would have rendered the instruction inadequate. It follows, therefore, that the jury was not unconstitutionally restricted in its consideration of mitigating factors. Evidence, to the extent any was introduced, relating to factors recited above such as emotional crisis, marital disharmony, and lack of prior criminal convictions would plainly have been subject to full consideration as elements of the other mitigating circumstances set forth in the jury instructions. See 42 Pa.C.S. § 9711(e)(2)–(3), (5) (addressing extreme mental and emotional factors); 42 Pa.C.S. § 9711(e)(8) ("Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense."); 42 Pa.C.S. § 9711(e)(1) (lack of significant history of prior criminal convictions).

Next, appellant raises a group of issues consisting of a plethora of assertions of trial counsel's ineffectiveness. Many of these are restatements of matters addressed in earlier appeals and warrant little further comment. Others consist of allegations that omissions occurred in the presentation of potentially mitigating evidence. Examination of the record reveals, however, that counsel made a competent showing of such mitigating evidence as was available, including the testimony of appellant and testimony of character witnesses.

The allegedly omitted evidence can be classified generally as insignificant, irrelevant, or cumulative. For example, it is

claimed that evidence should have been introduced that appellant was a member of the 4H Club and the Lions Club. In view of the seriousness of this crime and the extent of other evidence of character and record presented for the jury's consideration, it is inconceivable that appellant's club memberships could have affected his sentence. Similarly, it is asserted that counsel failed to present evidence that one of appellant's children had been killed in an automobile accident nearly two years before the present murder, yet examination of the record reveals that this evidence was indeed introduced during the guilt determination phase of trial. (N.T. 1046, 1102). During the penalty phase of trial, counsel moved for admission of all of the defense evidence from the guilt phase. Evidence regarding the death of appellant's child, as well as additional evidence pertaining to appellant's character, reputation, and marital relationship thereby came before the jury for consideration. With regard to his marital relationship, appellant claims evidence in mitigation could have been offered that his wife, the victim in this murder, had been having extramarital affairs. Such evidence would have been of little worth, since there was already evidence in the record that appellant and his wife suffered serious marital problems, and, further, the evidence would have appeared preposterous to the jury and would have undermined appellant's credibility since appellant himself had testified during the guilt determination phase that he was certain that his wife never engaged in extramarital affairs.

It is also claimed that the jury should have been informed that one of appellant's co-conspirators, who fired the fatal shot in this murder, received only a sentence of life imprisonment. Sentencing is a highly individualized matter, and we have already ruled that the cases against appellant's co-conspirators are not similar to appellant's case for purposes of proportionality

review. *Commonwealth v. Frey*, 504 Pa. at 444-45, 475 A.2d at 708. The sentence received by a co-conspirator is not a mitigating circumstance as to appellant's role in the crime.

Next, appellant claims his defense was prejudiced by counsel's failure to present the testimony of a certain coconspirator. This Court has already considered the testimony in question and determined that it would not have affected the verdict. *Commonwealth v. Frey*, 512 Pa. at 565-567, 517 A.2d at 1268-1270.

Appellant further asserts that counsel, during his closing argument, misstated the number of mitigating circumstances that might be found in this case. Counsel did, in fact, comment with regard to the number of such circumstances that that there "may be two, or perhaps only one." Yet counsel then proceeded to make an argument encompassing a broad range of factors including references to appellant's age, character, background, record, and the possibility that appellant's actions were the result of duress or coercion. During instructions to the jury on sentencing matters, the court fully informed the jury of the complete range of mitigating circumstances that might be found in this case. Appellant was not prejudiced by counsel's comment.

Counsel's effectiveness is also challenged through cursory arguments that voir dire was inadequate and that inflammatory details of the murder were admitted without objection. We have examined these claims and find no basis for relief.

It is also claimed that counsel should have objected when the prosecutor allegedly stated during closing arguments at the guilt determination phase of trial that two of appellant's co-conspirators were not called to testify because they would have invoked the Fifth Amendment. Examination of the record

reveals that this claim is without merit. The prosecutor did not say that the co-conspirators *would* have invoked the Fifth Amendment, but rather stated that there were a *number* of reasons for his reluctance to call the co-conspirators to the stand, and that just one of those reasons was the possibility that they *might* assert their Fifth Amendment rights. Further, the prosecutor's comment was merely a response to defense counsel's closing argument in which it was inferred that the prosecution had an obligation to produce the co-conspirators' testimony. Significantly, too, defense counsel's closing argument expressly informed the jury that the co-conspirators might have asserted their rights to remain silent if they had been called by the prosecution as witnesses. Thus, the prosecutor's comment was a mere repetition of information that defense counsel had already disclosed to the jury; hence, there was no basis for objection.

The final issue presented for our review concerns the admissibility of testimony given by a prosecution witness, Sharon Bowers, at the penalty hearing. The fact that Bowers had knowledge pertinent to this case was not discovered by investigating authorities until after the close of the prosecution's case at the guilt determination phase of trial; hence, her testimony was offered only at the penalty hearing. Bowers testified that she became acquainted with appellant at her place of employment and stated that appellant often engaged her in conversations about his marital problems. She further testified that during one of these conversations, approximately six months before the present murder, appellant expressed a desire to murder his wife:

> One of the times Rod [appellant] was complaining about Barb [his wife], I remember that he made the

> remark that he said I would kill the son of a b---- if I knew I could get away with it, and it really surprised me that he said it and, you know, I stopped what I was doing, because we were both always working, you know, back there at the same time. I said oh, come on, Rod, you don't mean that. And he said yes, I do. He said then she couldn't enjoy her money, or it was one of the times he was complaining about financial problems they were having that he made the remark.

It is argued that this testimony should not have been introduced, in that it was assertedly not pertinent to proof of any of the aggravating circumstances enumerated in the sentencing statute. See 42 Pa.C.S. § 9711(d). The record reveals, however, that the court allowed admission of this testimony on grounds it tended to disprove a mitigating circumstance claimed by the defense throughout trial, to wit, that appellant had been coerced and influenced by a co-conspirator. Clearly, the testimony in question did show appellant's uncoerced desire, even months before the murder took place, to end the life of his wife. For this reason, the testimony was properly admitted.

Judgment of sentence affirmed.

APPENDIX H — EXCERPTED TRANSCRIPT OF PROCEEDINGS FILED JANUARY 8, 1981

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA — CRIMINAL DIVISION

NO. 169 of 1980

COMMONWEALTH OF PENNSYLVANIA,

VS.

RODERICK HERMAN FREY

Defendant

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL/SENTENCING HEARING

Before: Hon. WILSON BUCHER, Judge

Date: May 14, 15, 1980

Place: Courtroom Number Two
Lancaster County Courthouse
50 North Duke Street
Lancaster, Pennsylvania

* * *

[1388] contract killings, all contract killing, aggravating circumstances. I think one thing that may be helpful to you is try to think of some kind of contract killing is worse than this.

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Using those factors that I suggested to you, using your common sense and other things that you can think about — that is all I have to really say. You promised to obey the law. Let's do it.

THE COURT: Members of the jury, you must now decide whether this defendant should be sentenced to death or life imprisonment. The sentence will depend upon your findings concerning aggravating and mitigating circumstances. The Crimes Code provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

Now, the Crimes Code defines aggravating and mitigating circumstances. For purposes of this case, only the following matters, if proven, can constitute [1389] aggravating circumstances, and that is this:

The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for killing the victim.

For purposes of this case, the following matters, if proven, can constitute mitigating circumstances:

The defendant has no significant history of prior criminal convictions.

The defendant was under the influence of extreme mental or emotional disturbance.

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The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The youth or advanced age of the defendant at the time of the crime.

The defendant acted under extreme duress or acted under substantial domination of another person.

Any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense.

[1390] Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. I have already defined for you what reasonable doubt means in my principal charge.

The defendant has the burden of proving mitigating circumstances but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.

A preponderance of the evidence exists where one side is more believable than the other side. All the evidence from both sides, including the evidence you heard earlier during the trial in chief, as to aggravating or mitigating circumstances, is important and appropriate for you to consider.

Now, members of the jury, the verdict is for you to decide. Remember and consider all of the evidence giving it the weight to which it is entitled. Remember, too, that you are not merely recommending a punishment. The verdict you return will actually fix the punishment at death or life imprisonment. Remember

again that your verdict must be unanimous. It cannot be reached by a majority vote or by any percentage. It must be the verdict of each and every [1391] one of you.

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstances and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

Now, you will be given a verdict slip upon to which to record your verdict and findings. This is a verdict slip. It is self-explanatory and you will take it with you, and please note that it consists of two pages in the event that you have to make findings in the case of the death sentence, and you follow that verdict slip and I think it will explain itself as you go along.

Now, if after conscientious and thorough deliberations you are unable to agree on your findings and verdict, you should report that to me. If in my opinion further deliberations will not result in a unanimous agreement on the sentence, it will be my duty to sentence the defendant to life imprisonment.

All right. You may take this case and give [1392] it your careful consideration.

Do counsel have anything further?

MR. KENNEFF: No.

MR. SORRENTINO: No, you Honor.

Appendix H

(Whereupon, the jury retired at 7:38 p.m., May 14, 1980, to begin its deliberations.)

(Whereupon, at 1:18 a.m., May 15, 1980, the jury returned in the above-entitled manner:)

THE COURT: Now, poll the jury and take the verdict, please.

THE CLERK: Will you please answer here as I call you name?

(Whereupon, the jury was polled by the Clerk of Courts. All were present.)

THE CLERK: Will the foreman please rise?
Mr. Foreman, has the jury reached a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: What is the jury's verdict?

THE FOREMAN: The verdict is death.

THE COURT: Let the verdict be recorded.

THE CLERK: Members of the jury, hearken to your verdict as the Court has recorded it.

In the Commonwealth of Pennsylvania versus [1393] Roderick Herman Frey, under information number 169 of 1980, charged with murder and sentencing verdict, and you say and now, May 15, 1980, we the jurors impaneled in the above-

captioned case unanimously sentence the defendant to death, so say you all? Please say we do.

THE JURY: We do.

THE COURT: All right. Is there anything further before we discharge the jury?

MR. SORRENTINO: I would like the jury polled, your Honor.

THE COURT: All right. Poll the jury.

THE CLERK: Will you please rise as I all your name and state your verdict?
Donald Snyder, please state your verdict.

THE JUROR: Death.

THE CLERK: Martha Young?

THE JUROR: Death.

THE CLERK: Frank Liebert?

THE JUROR: Death.

THE CLERK: Betty Waughtel?

[1394] THE JUROR: Death.

THE CLERK: Josephine Garver?

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THE JUROR: Death.

THE CLERK: Robert Wash?

THE JUROR: Death.

THE CLERK: Ronald Young?

THE JUROR: Death.

THE CLERK: Paul Apple?

THE JUROR: Death.

THE CLERK: Mary Page?

THE JUROR: Death.

THE CLERK: Mary Hahn?

THE JUROR: Death.

THE CLERK: Marjorie Hart?

THE JUROR: Death.

THE CLERK: And Yvonne Ehrhart?

THE JUROR: Death.

THE CLERK: Thank you.

THE COURT: Now, gentlemen, is there any reason why this jury should not be discharged?

MR. KENNEFF: No, your Honor.

MR. SORRENTINO: No, your Honor.

THE COURT: Members of the jury, the Court appreciates very much your service in this case. We know this has been an ordeal. You have been very [1395] faithful and very loyal and the Court appreciates it very much.

You are excused. Thank you very much.

(Whereupon, the jury was excused from the courtroom.)

MR. SORRENTINO: May we approach the bench, your honor?

THE COURT: Yes.

(Whereupon, the following occurred at sidebar between counsel and the Court:)

MR. SORRENTINO: If it please the Court, for the matter of record, I would make a motion that the Court set the penalty imposed by the jury aside on the grounds that the death penalty is unconstitutional.

THE COURT: Well, are you asking that I dispose of this matter now?

MR. SORRENTINO: Yes, your Honor.

THE COURT: The motion is denied.

Now, would you bring him up so I can tell him about these post-trial motions?

MR. SORRENTINO: Yes, your Honor.

(End of discussion at sidebar.)

[1396] THE COURT: Now, Mr. Frey, the jury having found you guilty of first degree murder, the Court advises you that you have the right to file post-verdict motions and you have the right to the assistance of counsel in the filing of such motions and on appeal of any issues raised therein. You must file the post-verdict motions in writing within ten days of this date, and only the grounds contained in such motions may be raised on appeal.

Do you understand what I have just told you?

MR. FREY: Yes, sir.

THE COURT: All right, Mr. Sorrentino, you are counsel in this case.

MR. SORRENTINO: Yes, you Honor.

THE COURT: All right. And you will remain counsel until these matters are disposed of.

MR. SORRENTINO: Yes, your Honor.

THE COURT: All right.

Court will rise until tomorrow morning at 9:00 o'clock.

(Whereupon, the proceeding was adjourned at 1:24 a.m.)

APPENDIX I — SENTENCING VERDICT IN THE COURT OF COMMON PLEAS OF LANCASTER, COUNTY PENNSYLVANIA, CRIMINAL DIVISION DATED MAY 15, 1980

IN THE COURT OF COMMON PLEAS OF
LANCASTER COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 169 of 1980

COMMONWEALTH OF PENNSYLVANIA

V.

RODERICK HERMAN FREY

SENTENCING VERDICT

AND NOW, May 15, 1980, we the jurors empaneled in the above captioned case unanimously sentence the defendant to *DEATH*

If the sentence is death complete the following portion. (check only one block)

We the jury have found unanimously

* * *

☒ One or more aggravating circumstances which outweigh any mitigating circumstances. The aggravating circumstance(s) (is) (are)
Murder by Contract

Appendix I

s/ Donald Snyder
s/ Martha M. Young
s/ Frank M. Liebert
s/ Betty Waughtel
s/ Josephine Garver
s/ Robert S. Wash
s/ Ronald M. Young
s/ Paul J. Appel Jr.
s/ Mary Page
s/ Mary Hahn
s/ Marjorie Hart
s/ Yvonne C. Ehrhart

APPENDIX J — RELEVANT ACTS

Act 1978-141 LAWS OF PENNSYLVANIA

NO. 1978-141

AN ACT

SB 1233

Amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, further providing for the imposition of sentences for murder.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 1311 of title 18, act of November 25, 1970 (P.L.707, No. 230), known as the Pennsylvania Consolidated Statutes, is amended to read:

[§ 1311. Sentencing for murder.

(a) Findings by jury. — The jury before whom any person shall be tried for murder, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first degree, murder of the second degree or murder of the third degree.

(b) Instructions to jury and recording verdict. — In a trial for murder, the court shall inform the jury prior to their deliberations, as to the penalties for murder of the first degree, murder of the second degree and murder of the third degree. The court shall also inform the jury that if they find the defendant guilty of murder of the first degree, it will be their

further duty to determine whether the killing was accompanied by any aggravating or mitigating circumstances as set forth in subsection (d) of this section after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof.

(c) Procedure at sentencing hearing. — After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received from the trial as may be relevant and admissible upon the question of aggravating and mitigating circumstances and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. Aggravating circumstances must be proved beyond a reasonable doubt. Mitigating circumstances must be proved by a preponderance of the evidence. The jury shall then retire and consider the aggravating and mitigating circumstances and render such verdict respecting them as they shall agree upon. A failure of the jury to agree upon the aggravating and mitigating circumstances shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of the opinion that further deliberation by the jury will not result in an agreement upon the aggravating and mitigating circumstances, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial is directed, the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury and recorded as aforesaid and the jury shall be so informed prior to their deliberations. The court shall impose the sentence so fixed as in other cases.

Appendix J

(d) Aggravating and mitigating circumstances. — If a murder of the first degree is accompanied by at least one of the following aggravating circumstances and none of the following mitigating circumstances, the person convicted shall be sentenced to death. If a murder of the first degree is not accompanied by any of the following aggravating circumstances or is accompanied by at least one of the following mitigating circumstances the person convicted shall be sentenced to life imprisonment:

(1) Aggravating circumstances. —

(i) The victim was a fireman, peace officer or public servant concerned in official detention as defined in section 5121 of this title (relating to escape), who was killed in the performance of his duties.

(ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(vi) The defendant committed a killing while in the perpetration of a felony.

(vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(viii) The offense was committed by means of torture.

(ix) The defendant has been convicted of another Federal State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(2) Mitigating circumstances. —

(i) The age, lack of maturity, or youth of the defendant at the time of the killing.

(ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.

(iii) The defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress).

(e) Guilty pleas and non-jury trials. — In cases of pleas of guilty, or trial by court, the court shall impose sentence in accordance with Rules of Criminal Procedure as promulgated by the Supreme Court of Pennsylvania.

(f) Record of death sentence to Governor. — Where a sentence of death is imposed, the clerk of the court wherein conviction takes place, shall within ten days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

(g) Review of death sentence. — A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania within 60 days after certification by the sentence of death shall for any reason be invalidated then the convicted defendant shall undergo the sentence of life imprisonment.]

§ 1311. Sentencing procedure for murder of the first degree.

(a) Procedure in jury trials. —

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissable on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the

sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty pleas. — If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury. —

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) The aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) The mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) Aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) The verdict must be a sentence of death if the jury unanimously finds at least one aggravating

circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The Court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances. — Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in section 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had been contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(e) Mitigating circumstances. — Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under section 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) Sentencing verdict by the jury. —

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

Appendix J

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) Recording sentencing verdict. — Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) Review of death sentence. —

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(3) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

Appendix J

(i) Record of death sentence to Governor. — Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court.

Section 2. This act shall take effect immediately.

We certify that this bill, Senate Bill No. 1233, Printer's No. 2034, having passed both Houses, vetoed by the Governor, official notification of which was returned to the Senate where the Senate reconsidered and passed the bill by a two-thirds majority of the members elected to the Senate September 12, 1978, the objections to the Governor to the contrary notwithstanding. Upon notification by the Senate as to their action, the House of Representatives reconsidered and passed the bill on September 13, 1978 by a two-thirds majority of the members elected to the House of Representatives, the objections of the Governor to the contrary notwithstanding.

Given under our hand and seal this thirteenth day of September, one thousand nine hundred and seventy-eight.

MARTIN L. MURRAY
President Pro Tempore,
Senate

K. LEROY IRVIS
Speaker,
House of Representatives

MARK GRUELL
Secretary, Senate

VINCENT F. SCARCELLI
Chief Clerk, House of
Representatives

Note: The date of final enactment No. 1978-141 is Sept. 13, 1978.

ORIGINAL

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APR 29 1998
CLERK

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SUPREME COURT, U.S.

OCTOBER TERM, 1997

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 97-1606

THOMAS A. FULCOMER, Warden
State Correctional Institution at Huntingdon,

Petitioner,

v.

RODERICK HERMAN FREY,

Respondent.

RESPONDENT'S MOTION AND AFFIRMATION FOR IN FORMA PAUERIS RELIEF AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, through counsel, respectfully moves for in forma pauperis relief and for leave to proceed in forma pauperis and in support of this applicaiton submits as follows:

1. This case is before the Court on a petition for writ of certiorari.

2. Respondent is indigent. He was found to be indigent and in forma pauperis relief was granted in the state courts. He was represented in the state courts by court appointed counsel.

3. Respondent is incarcerated and is without funds to secure the services necesssary to proceed in this court (e.g. printing fees, etc.) or to pay any fees.

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4. Counsel was appointed pursuant to 18 U.S.C. § 3006A by the Court below.

5. Counsel is a member of the bar of the Supreme Court of the United States.

WHEREFORE, the Respondent prays for leave to proceed in forma pauperis.

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Date: April 29, 1998

No. 97-1606

IN THE

Supreme Court of the United States

October Term, 1997

THOMAS A. FULCOMER, Warden,
State Correctional Institution at Huntingdon,

Petitioner,

vs.

RODERICK HERMAN FREY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the United States Court of Appeals, reviewing a district court's habeas corpus decision, must *sua sponte* raise and decide whether a constitutional violation for which a habeas petitioner is entitled to relief on the merits constitutes a new rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), where the State has waived the *Teague* non-retroactivity defense by failing to raise it in its briefs or in oral argument in the Court of Appeals?

2. Whether, after the Court of Appeals' careful review of the totality of the circumstances, it correctly applied *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990), and *Boyde v. California*, 494 U.S. 370 (1990), after determining that the jury instruction and verdict slip in this case created a reasonable likelihood that the jury must unanimously agree as to the existence of a mitigating circumstance before considering such circumstances in its capital sentencing deliberations?

PARTIES TO THE PROCEEDING

Respondent in this matter is Roderick Herman Frey, an inmate sentenced to death and currently held on death row in the Commonwealth of Pennsylvania.

Petitioner is Thomas A. Fulcomer, Warden of the State Correctional Institution at Huntingdon, Pennsylvania.[1]

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1. Respondent is now incarcerated in the State Correctional Institution at Greene, Pennsylvania.

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II. THIS COURT SHOULD NOT GRANT CERTIORARI TO RECONSIDER AS A COURT OF ERRORS THE CIRCUIT COURT'S UNANIMOUS AND CORRECT DETERMINATION THAT THE PARTICULAR JURY INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE CONSTITUTIONAL STANDARDS SET FORTH IN MILLS v. MARYLAND, McKOY v. NORTH CAROLINA, AND BOYDE v. CALIFORNIA. 10

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BRIEF IN OPPOSITION

Respondent, Roderick Herman Frey, prays that this Court deny the Petition for Writ of Certiorari, and in opposition thereto submits as follows:

COUNTER-STATEMENT OF THE CASE

This case arises out of the killing of Respondent's wife, Barbara Frey, on November 8, 1979. Mrs. Frey was actually killed by Charles Zehring and Richard Heberlig. Although Zehring came up with the idea to kill Mrs. Frey, pressured Respondent to hire him to carry out the killing, and subjected Mr. Frey to threats, harassment, and extortion to intimidate Mr. Frey from backing out of the plan, "the prosecution of the murderers of Mrs. Frey . . . produced an unusual result: the person who first cooperated with the police, confessed, and implicated others has been sentenced to death, whereas the two persons who actually committed the murder have received life sentences." *Frey v. Fulcomer*, 1991 WL 53662, at *5 (E.D. Pa. 1991).

The Zehring, Heberlig, and Frey cases were assigned to different prosecutors and scheduled for separate, simultaneous trials in adjacent courtrooms. The Heberlig and Frey cases proceeded simultaneously. However, Zehring's trial was delayed. Zehring and Heberlig waived jury sentencing and were sentenced to life imprisonment in separate bench proceedings.

On Friday, May 14, 1980, Respondent was convicted of first-degree murder. As described by the District Court, "the penalty hearing commenced almost immediately after the guilty verdict was returned, late in the afternoon." *Id.* at *6. The case was among the first to be tried under the capital sentencing scheme enacted by the Pennsylvania legislature after the

previous sentencing statute, which restricted the presentation of mitigating evidence to three enumerated mitigating circumstances[2] had been declared unconstitutional in *Commonwealth v. Moody*, 476 Pa. 223, 382 A.2d 442 (1977). The new sentencing statute permitted consideration of eight mitigating circumstances, including an open-ended mitigating circumstance permitting introduction of "any other" mitigating evidence. 42 Pa. C.S. § 9711(e)(8), 1991 WL 53662, at *5. The District Court reports that

> the penalty case was submitted to the jury at about 7:30 p.m. The trial transcript reflects no further activity until the jury verdict at 1:15 a.m. the following day . . . The parties have stipulated, however, that petitioner's counsel did indeed object to the trial judge, at about 10:30 p.m., that the jury was probably tired out, and should not be required to deliberate any longer that evening. The trial judge ruled that, since no communication had been received from the jury, their deliberations would continue. No record was made of this episode, because the court reporter was not available.

Id. at *6. The jury returned the following afternoon with a death sentence.

On April 13, 1984, the Supreme Court of Pennsylvania affirmed Respondent's conviction and sentence, *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), and this Court denied certiorari. *Frey v. Pennsylvania,* 469 U.S. 963 (1984). On July 10, 198[illegible] Respondent filed a motion with the Court of Common Pleas for a new trial based upon after-discovered evidence in the form of a statement given by Zehring to Respondent's counsel on April 26, 1984. That statement had indicated that Respondent's participation in the offense

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2. *See* former 18 Pa. C. S. § 1311(d)(2) (limiting the circumstances which the jury is to consider mitigating to "the following mitigating circumstances": "(i) The age, lack of maturity, or youth of the defendant at the time of the killing. (ii) The victim was a participant in or consented to the defendant's conduct as set forth is section 1311(d) of this title or was a participant in or consented to the killing. (iii) the defendant was under duress although not such duress as to constitute a defense to prosecution under section 309 of this title (relating to duress)."

was only as a result of Zehring's threats, duress, and overwhelming domination. On September 18, 1984, the trial court denied the motion for new trial without a hearing, and the Pennsylvania Supreme Court, which treated this motion as a petition for post-conviction collateral relief, affirmed. *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265 (1986), *cert. denied,* 481 U.S. 1007 (1987).

Governor Robert Casey then issued a death warrant, following which Respondent filed a petition for post-conviction relief and a request for a stay of execution in the Court of Common Pleas. In this post-conviction petition, Frey presented the claim that the jury charge at the penalty phase of his trial violated *Mills v. Maryland*, 486 U.S. 367 (1988). Although *Teague v. Lane* had already been argued before this Court, the Commonwealth did not argue that *Mills* should not be applied retroactively. On June 9, 1988, the Pennsylvania Supreme Court granted a stay of execution pending appeal, and on February 3, 1989, denied relief. *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989), *rearg. denied* (April 25, 1989), *cert. denied*, 494 U.S. 1038 (1990). The Pennsylvania Supreme Court reached the *Mills* claim on its merits. *See Frey,* 520 Pa. at 346-48, 554 A.2d at 30-31.

Respondent filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 claim. Again, although *Teague* had already been decided, the Commonwealth made no retroactivity argument.

Following what the Third Circuit described as "an extensive evidentiary hearing," the habeas court denied Respondent's challenges to his conviction but granted the writ of habeas corpus as to sentencing because of counsel's ineffectiveness in proceeding under the wrong

statute. *Frey v. Fulcomer*, 1991 WL 53662 (E.D. Pa. 1991).[3] Given its resolution of the ineffectiveness issue, the habeas court did not reach a number of other sentencing issues presented by Frey including his *Mills* claim. A split panel of the Third Circuit reversed the issuance of the writ, ruling that counsel's performance, while deficient, was not prejudicial because the prosecution and the Court had explained to the jury the applicable law. *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992), *cert. denied*, 507 U.S. 954 (1993). The Third Circuit remanded to the District Court for resolution of the remaining issues, including the *Mills* claim.

On remand, the District Court requested further briefing, including briefing on the *Mills* claim. Again, the Commonwealth failed to raise any *Teague* or nonretroactivity argument. In October 1995, after an additional hearing and supplemental briefing, the district court denied relief. Respondent appealed, raising the *Mills* claim and a number of other grounds for appeal.[4] Again, Petitioner failed to raise any *Teague* or nonretroactivity defense in its brief to the Third Circuit or in oral argument. At oral argument, Chief Judge Becker

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3. The habeas court also granted relief on the grounds that the trial court had improperly permitted the introduction in sentencing of the testimony of Sharon Bowers that was not relevant to any statutory aggravating circumstance. The Third Circuit later held that this testimony did not violate Pennsylvania law or deny Respondent due process.

4. Because the Third Circuit reversed Respondent's death sentence under *Mills*, it did not reach his claim concerning the mitigating statements made by Zehring after Frey's sentence was complete. The Court also reserved judgment on Respondent's claim that the defects and due process violations involved in the statutorily mandated proportionality review performed by the Pennsylvania Supreme Court arbitrarily denied his liberty interest, protected by the Fourteenth Amendment, in such mandatory appellate review.

directed that Respondent brief the viability or preclusion of another issue in the case,[5] and invited the Commonwealth to raise *any* issue it believed might create a procedural bar to *any* claim presented in the appeal. Respondent filed the requested brief. The Commonwealth (Petitioner now) did not respond to the court's invitation and filed no brief raising *Teague* or any other procedural-type defense.

On December 30, 1997, the Third Circuit reversed Respondent's death sentence, unanimously determining that the instruction and verdict slip employed by the trial court violated *Mills*. *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997). Only in its petition for rehearing en banc, filed after the Third Circuit had itself *expressly ruled* that a *Teague* defense had been waived, did Petitioner for the first time—after eight years of federal litigation—finally raise the issue. By a vote of 10 - 1, the Third Circuit denied Petitioner's motion for reargument en banc.

The Commonwealth now seeks certiorari review of the *Mills* claim in this Court, claiming that the Third Circuit had been "invited" to apply *Teague* in this case. It has stipulated that it will not seek to resentence Respondent—who, after eighteen years on death row is now 62 years old—to death if this Court denies certiorari or affirms the decision of the Third Circuit. *See* Petition for Certiorari, Appendix A.

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5. That issue was whether there was any procedural bar to Frey's claim that the trial court had erroneously instructed the jury that his middle age at the time of the offense could not be considered mitigating.

ARGUMENT IN OPPOSITION

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS PROPERLY APPLIED *MILLS v. MARYLAND, McKOY v. NORTH CAROLINA,* AND *BOYDE v. CALIFORNIA* IN FINDING THAT THE PARTICULAR INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE COMMONWEALTH WAIVED ANY ARGUMENT THAT MILLS SHOULD NOT BE RETROACTIVELY APPLIED TO THIS CASE.

I. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT PETITIONER HAD WAIVED ANY NON-RETROACTIVITY DEFENSE TO RESPONDENT'S MERITORIOUS *MILLS v. MARYLAND* CLAIM BY FAILING TO RAISE THE ISSUE OF *TEAGUE v. LANE* DURING THE HABEAS PROCEEDINGS IN THE DISTRICT AND CIRCUIT COURTS.

Petitioner suggests that this case presents to this Court the question:

> Whether this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), constitutes a new rule of law that, pursuant to *Teague v. Lane*, 489 U.S. 367 (1988) [sic], cannot be applied retroactively to award sentencing relief to a state prisoner whose conviction became final before the new rule was announced.

Respondent, however, respectfully suggests that whether or not *Mills* announced any new rule of law is irrelevant in this case. Petitioner has waived the *Teague* defense by failing to raise it in any court despite numerous opportunities to do so. *See Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3d Cir. 1997). Petitioner's proposed question is not presented—and should not be decided—in this case. *See Campbell v. Louisiana*, 1998 WL 184478, at *7 (U.S. April 21, 1998).

Respondent exhausted the *Mills* issue by presenting it in his Post Conviction Hearing Act proceedings in state court. Although *Teague* was then pending before this Court, the

Commonwealth did not argue in any Pennsylvania court that *Mills* should not be applied retroactively. The Supreme Court of Pennsylvania addressed the *Mills* claim on the merits, and did not rely on any non-retroactivity analysis.

Respondent then presented his *Mills* claim to the District Court. Petitioner did not raise any nonretroactivity defense in its answer or briefs to the District Court even though *Teague* had already been decided. After remand to the District Court for disposition of the issues not decided in the court's first habeas decision, Respondent continued to assert his *Mills* claim. Again, despite the opportunity for further briefing and argument, Petitioner did not make any attempt to present any *Teague* defense.

Petitioner also failed to argue *Teague* before the Court of Appeals for the Third Circuit. Although Respondent prominently discussed the *Mills* issue in his appellate brief, Petitioner (then Appellee) did not argue in its brief that *Mills* constituted a new rule of law that should not be retroactively applied. In addition, Petitioner never asserted any *Teague* defense to the *Mills* claim during the extended oral argument before the Third Circuit on this issue, and Petitioner again failed to assert this argument despite an invitation from Chief Judge Becker to provide supplemental briefing on any procedural issue that it believed might be present in this case.[6]

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6. In the Certiorari petition, Petitioner asserts that the Third Circuit somehow declined the State's "invitation" to address *Teague* in this case. This suggestion is peculiar, given that Petitioner's supposed "invitation" was never extended to the Court of Appeals until its request for reargument en back, *after* the Circuit panel had unanimously granted relief on the merits of the *Mills* claim and ruled that the Commonwealth had waived *Teague* by consistently failing to raise *Teague* before any federal court. Such an invitation — like an invitation to a dance after the band has played and the guests have gone home — is no invitation at all. Petitioner had more than eight years to raise *Teague* in four different courts and did not do so. Circuit courts need not adjudicate afterthoughts, and the en banc court's 10-1 decision not to do so here was well within its discretion.

To even reach Petitioner's question, this Court would first have to make the non-retroactivity principle embodied in *Teague* jurisdictional and mandate that the United States Court of Appeals, in reviewing habeas corpus decisions, *sua sponte* determine whether a constitutional claim for which a habeas petitioner is entitled to relief on the merits is barred under *Teague*. Consequently, the question actually presented in this case is:

> Whether the United States Court of Appeals, reviewing a district court's habeas corpus decision, must *sua sponte* raise and decide whether a constitutional violation for which a habeas petitioner is entitled to relief on the merits constitutes a new rule of law under *Teague v. Lane*, 489 U.S. 288 (1989), where the State has waived the *Teague* non-retroactivity defense by failing to raise it in its briefs or in oral argument in the Court of Appeals?

The answer to *this* question is a simple and straightforward "no." *See, e.g., Schiro v. Farley*, 510 U.S. 222, 228-29 (1994); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

This answer does not require addressing any important unresolved issues of constitutional law, or even any issue as to which there is conflict among the Circuits. It is not a question that merits certiorari review. Every member of this Court has written or joined an opinion stating that the *Teague* nonretroactivity defense is *not* jurisdictional and may be waived. *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (O'Connor, J., for eight Justices); & *id.* at 397 (Stevens, J., dissenting); *see also Schiro, Godinez, Youngblood, supra.*

Similarly, this Court has unanimously determined that the Courts of Appeals are not required to *sua sponte* raise the affirmative defense of procedural default in a habeas corpus case when the State has failed to do so itself. *Trest v. Cain*, 118 S. Ct. 478, 480 (1997).

As the Court explained in *Caspari*, 510 U.S. at 389:

> A threshold question in every habeas case . . . is whether the court is obligated to apply the Teague rule to the defendant's claim. We have recognized that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide the issue sua sponte." Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990) (emphasis omitted). Thus, a federal court may, but need not, decline to apply Teague if the State does not argue it. See Schiro v. Farley, ___ U.S. ___, ___, 114 S.Ct. 783, 788, 127 L.Ed.2d 47 (1994).

The State here did not argue *Teague* in its answer, briefs, or oral argument in the District Court or in its briefs or at oral argument in the Court of Appeals, and the Third Circuit—properly exercising its discretion under *Schiro* and *Caspari* -- held that any potential nonretroactivity defense had been waived. Given the Commonwealth's waiver of *Teague*, the first question proposed by Petitioner is simply not present in this case. To even consider that question, this Court would be required to abandon its consistent and unanimous determination that *Teague* and other habeas affirmative defenses can be waived, and declare that Circuit Courts are not deserving of discretion to determine the circumstances in which such a waiver may occur.

"Since a State can waive the *Teague* bar by not raising it, and since the propriety of reaching the merits of a dispute is an important consideration in deciding whether or not to grant certiorari," *Schiro*, 510 U.S. at 229, this Court should not grant certiorari to explore a habeas defense that was never asserted, never briefed, and never argued below. Moreover, this Court found *Teague* waived in *Schiro* where the State was the respondent, and therefore was "entitled to rely on any legal argument in support of the judgment below." *Id.* at 228-29. It unquestionably should not *sua sponte* raise and decide *Teague* here where the State, as Petitioner, untimely raises this defense *in opposition to* the judgment below.

This court should deny certiorari in this case.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO RECONSIDER AS A COURT OF ERRORS THE CIRCUIT COURT'S UNANIMOUS AND CORRECT DETERMINATION THAT THE PARTICULAR JURY INSTRUCTIONS AND VERDICT SLIP EMPLOYED IN THIS CASE VIOLATED THE CONSTITUTIONAL STANDARDS SET FORTH IN *MILLS v. MARYLAND, McKOY v. NORTH CAROLINA,* AND *BOYDE v. CALIFORNIA.*

Petitioner's second question essentially asks this Court to determine whether the Third Circuit appropriately applied the settled -- and uncontested -- law set forth by this Court in *Mills v. Maryland*, *McKoy v. North Carolina,* and *Boyde v. California* to the facts of this case. At its core, Petitioner asks this Court to act as a court of errors, to review the unanimous decision of the panel below applying this law to the jury instructions and verdict slip employed in this case.[7]

The constitutional principles implicated in this case are well established and have not been challenged by Petitioner. This Court has written:

> It is beyond dispute that in a capital case the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . The corollary that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence is equally well established.

Mills v. Maryland, 486 U.S. 367, 374-75 (1988) (citations, emphasis, and internal quotation

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8. On February 1, 1989, the Supreme Court of Pennsylvania adopted Rules 357, 358A and 358B of the Pennsylvania Rules of Criminal Procedure (effective July 1, 1989), specifically designed to "provide statewide, uniform jury and judge sentencing verdict slips in death penalty cases." *Comment* to PA. R. CRIM. P. No. 357; *see also Commonwealth v. Tilley*, 528 Pa. 125, 143 n. 11, 595 A.2d 575, 583 n. 11 (1991) ("this rule was simply designed to provide statewide, uniform sentencing verdict slips in death penalty cases"). Under these rules, a verdict slip such as the one employed in this case is not in use anywhere in the Commonwealth of Pennsylvania.

marks omitted); *McKoy v. North Carolina*, 494 U.S. 433, 439-43 (1990); *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). In *Mills* and *McKoy*, this Court explained that requiring the jury to unanimously agree as to the existence of mitigating circumstance may prevent some jurors from considering and giving effect to factors that those jurors believe could justify imposing a life sentence. This burdening of the jury's ability to give effect to mitigating circumstances violates fundamental constitutional principles, and the error necessitates a new sentencing hearing. *McKoy*, 494 U.S. at 439-44; *Mills*, 486 U.S. at 374-76; *Penry*, 492 U.S. at 319.

In addition, the prospect of a hold-out juror preventing the imposition of a life sentence violates the central Eighth Amendment principle that a capital sentencing scheme may not be arbitrary and capricious. *See generally Furman v. Georgia*, 408 U.S. 238 (1972) (multiple opinions); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion). As Justice Kennedy explained in his concurring opinion in *McKoy:*

> The [*Mills*] Court stated: "The possibility that a single juror could block [consideration of a mitigating factor], and consequently require the jury to impose the death penalty, is one we dare not risk." 486 U.S. at 384, 108 S.Ct. at 1870. (emphasis added). [¶] Application of the death penalty on the basis of a single juror's vote is "intuitively disturbing." Id., at 374, 108 S.Ct. at 1865. More important, it represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in Mills described such a result as the "height of arbitrariness." Ibid. Given this description, it is apparent that the result in Mills fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means.

McKoy, 494 U.S. at 453-54 (Kennedy, J., concurring) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988); *California v. Brown*, 479 U.S. 538, 541 (1987)).

In 1990, this Court in *Boyde v. California*, 494 U.S. 370, 380 (1990), clarified the *Mills* standard by explaining that reversal was required when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence."

After careful analysis of this Court's uncontested precedents, the United States Court of Appeals for the Third Circuit unanimously held that the jury instructions and verdict slip employed in this case, viewed in the totality of the instructions in this case violated *Mills, McKoy,* and *Boyde*, finding a reasonable likelihood that the jury believed it must unanimously agree to the existence of any mitigating circumstance before considering the circumstance as a basis to spare Respondent's life. *Frey*, 132 F.3d at 920-25.

This case was rightly decided, and this Court should not grant certiorari.[8] But of equal

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8. The Petitioner suggests that *Frey* creates a conflict between the Circuits. This is difficult to fathom, given that *Frey* does not create a conflict even *within* the Third Circuit, which has separately analyzed and distinguished the different combinations of jury instructions and verdict slips that have been used in Pennsylvania. *Compare Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997) *with Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). Petitioner finds no conflict between Third Circuit precedent prior to this case and the decisions of other circuits, and none is created where — as here — the Circuit Court consistently applies settled law to a different set of facts. The Circuit Court itself rejected the claim that *Frey* and *Zettlemoyer* are inconsistent, voting 10-1 not to reconsider this case en banc. This Court should not grant certiorari to resolve a purported, but non-existent, intracircuit conflict where the Circuit itself has made clear no conflict exists.

Finally, there would be no intercircuit conflict even had the Third Circuit not carefully distinguished between the various factual scenarios in which it has decided *Mills* claims: the various instructions and verdict slips at issue in Pennsylvania have not been employed in other states — and indeed, because of the confusion they engendered, are no longer employed even in Pennsylvania itself. The law is consistent from the other jurisdictions. When courts have employed instructions requiring juror unanimity in considering mitigating circumstances, such instructions have uniformly been held to be unconstitutional. *See Mills, McKoy*; *see also Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110 (6th Cir. 1990) (en banc), *cert. denied*, 499 U.S. 970 (1991); *Kubat v. Theiret*, 867 F.2d 351 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989).

importance, "The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty,* 262 U.S. 159, 163 (1923) (Taft, C.J.). This Court should not grant certiorari where—as here—the Petitioner has principally asked this Court to serve as a Court of Errors. *See Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., with Renhquist, C.J., Kennedy & Thomas, JJ., dissenting) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (i.e. except in cases of the plainest error) be denied.").

A. The Third Circuit Correctly Applied This Court's Settled Case Law

Chief Judge Becker, writing for the Circuit Court, carefully described and reviewed this Court's and the Third Circuit's precedents and applied them to the particular instructions and verdict slip employed by the trial court in this case. The Third Circuit correctly determined that, in the totality of the circumstances surrounding the jury charge in this case, "it was reasonably likely that the jury could have believed that it was required to find the existence of mitigating circumstances unanimously before those circumstances could be considered in its deliberations." *Frey*, 132 F.3d at 924.

The sentencing stage instructions in *Frey* apprised the jury that it "must now decide whether this defendant should be sentenced to death or life imprisonment." N.T. 1388. The trial court then informed the jury that "*The sentence will depend upon your findings concerning aggravating and mitigating circumstances.*" *Id.* The trial court also used the collective "you" every time it referred to juror's fact-finding responsibilities.

In every subsequent instruction concerning sentencing-stage fact-finding, the trial court modified the verb "find" with the adverb "unanimously." In every subsequent instruction concerning fact-finding, the trial court used the phrase "unanimously find" as the predicate in a clause describing both aggravating and mitigating circumstances. As the Circuit Court explained:

> First and foremost, read in its entirety, the relevant portion of the jury charge emphasizes the importance of a unanimous finding, using the phrase frequently and in close proximity to—within seven words of—the mitigating circumstances clause.

Frey, 132 F.3d at 923. Consequently, the Third Circuit found that the frequent close proximity between the adverbial phrase "unanimously find" and the term "mitigating circumstance" in the instructions, and the rules of ordinary English usage and grammar, created a reasonable likelihood that the jurors "would, regardless of other qualifying language, believe that mitigating circumstances had to be found unanimously." *Id.*

This reasonable likelihood that the jury would understand the court's instructions as requiring unanimity was reinforced by other parts of the charge that the court found "were more likely to increase the confusion rather than lessen it." *Frey*, 132 F.3d at 923.

- First, the trial court never told the jury that each juror had the right to consider mitigating evidence if the jury did not find that mitigating circumstance unanimously. *Id.* at 923 n.5 (citing *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1110 (6th Cir. 1990) (en banc) ("Because the jurors in this case were told that aggravating factors had to be unanimous, but were not told exactly what role mitigating factors play, it would have been reasonable for them to assume that mitigating factors had to be found

unanimously as well.") *cert. denied*, 499 U.S. 970 (1991); *Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir.), *cert. denied*, 493 U.S. 874 (1989).

• Second, the trial court was able to distinguish between the burdens of proof applicable to aggravating and mitigating circumstances, further emphasizing its failure to do so with respect to any unanimity requirement. The trial court instructed that aggravating circumstances must be proven beyond a reasonable doubt while mitigators need be proven "only by a preponderance of the evidence[, which] is a lesser burden of proof." N.T. 1390. By failing to "stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements," the trial court increased the likelihood that a lay jury would believe that unanimity is required, "as is typically the case when considering whether a burden of proof has been met." *Frey*, 132 F.3d at 924.

• Third, the ambiguous language in the verdict slip, while not sufficient in the Circuit Court's eyes to constitute a constitutional violation by itself, still contributed to the jury's misunderstanding of its constitutional obligations. The Circuit Court noted that the Pennsylvania Supreme Court had subsequently "adopted a uniform verdict slip for capital sentencing cases which expressly aims to eliminate the type of ambiguity at issue here." *Frey*, 132 F.3d at 924. Unlike the verdict slip here, which again emphasized unanimity with respect to aggravating circumstances but was silent concerning mitigating circumstances, the uniform verdict slip adopted in 1989 specifically distinguishes between "aggravating circumstance(s) unanimously found" and "mitigating circumstance(s) ***found by one or more of us***." *See id.* at 924 n.6

(quoting PA. R. CRIM. P. No. 358A). As it had in *Mills*, the change in the verdict slip here caused the Circuit Court "at least some concern . . . that juries could misunderstand" the prior instructions and the particular verdict slip employed in this case. *Frey*, 132 F.3d at 924 (quoting *Mills*, 486 U.S. at 382).[9]

B. Other Evidence Supporting the Third Circuit's Ruling

The Third Circuit's conclusion that the jury was misled with respect to its fact-finding obligations at sentencing contains substantial additional support beyond that addressed in its unanimous opinion. Indeed, the trial court's actions during the guilt stage of trial stressed the principle of juror unanimity and substantially increased the likelihood that the jury would believe that the sentencing stage instructions dictated unanimous mitigation fact-findings.

The jury's view of the mechanics of its sentencing-phase fact-finding obligations was unquestionably shaped by the guilt stage instructions that the jury's verdict had to be unanimous. N.T. 1323.

Juries are assumed to remember—and to follow—the instructions of the trial court, and that assumption carries special force in a case such as this in which the court provided both the guilt and sentencing stage instructions *on the same day*. The jury would have assumed that it was to treat its fact-finding obligations at both stages of trial in the same manner—as requiring unanimity—unless instructed otherwise. This would be even more true where, as here, the court's sentencing instructions incorporated the instructions it had given at the guilt stage concerning other legal concepts that were applicable at both stages of the trial. For

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[9]. The Circuit panel indicated that the use of the uniform verdict slip in other cases "may cure the defect" for which the court granted relief in *Frey*. *See Frey*, 132 F.3d at 924.

example, in the penalty phase, the court instructed on reasonable doubt as follows: "Now, the Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt. I have already defined for you what reasonable doubt means in my principal charge." N.T. 1390.

Again, it is what is not said here that is significant. *Frey*, 132 F.3d at 923. The common view of lay Americans concerning trial proceedings in general is that juries collectively find facts and pass judgments. When the instructions at the guilt stage of trial ratify and reinforce that common view, there is a reasonable likelihood that (unless clearly instructed otherwise) the same jury deliberating at sentencing on the same day will apply its fact-finding obligations in the same manner. The Third Circuit has explained, in understated terms, that "[a] lay jury might plausibly conclude . . . that aggravating and mitigating circumstances must be discussed and unanimously agreed to" when the trial court's failed to "stress that the different burdens that attach to aggravating and mitigating circumstances also entail different unanimity requirements." *Frey,* 132 F.3d at 923-24. It is reasonably likely that such a jury will apply these instructions in an unconstitutional manner. That likelihood is even greater when that same lay jury

(1) has already been instructed to act unanimously in reaching a decision as to guilt or innocence, and has done so;

(2) has repeatedly heard the adjective "unanimous" used in close connection with its fact-finding obligations at sentencing; and

(3) is never informed that its common view of unanimous fact-finding, while correct as to aggravating circumstances, is wrong as to mitigation.

Neither the court nor counsel at sentencing ever explained to the jury the distinctly different fact-finding requirements that govern jury consideration of mitigating circumstances, and so the guilt stage instructions defining the jury's fact-finding obligations infused and misinformed its views of its sentencing stage responsibilities. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1109-10 (6th Cir. 1990) (capital sentence vacated where because the "common misperception" that jury findings should be unanimous may have affected consideration of mitigating evidence), *cert. denied*, 499 U.S. 970 (1991).

Thus, heading into the sentencing phase of trial, the twelve members of the jury knew that they had an important collective duty to find the facts. They knew the jury as an entity was a collective finder of fact; and that its collective finding was to be unanimous. They knew that they had made a unanimous finding of murder of the first degree, and they had been instructed by the Court, during the penalty phase of trial, that their "verdict must be unanimous." N.T. 1390. They had no indication that fact-finding at sentencing would be different in any way from fact-finding at the guilt stage; no indication that fact-finding for aggravating circumstances would be different in any way from fact-finding for mitigating circumstances; and no inkling whatsoever that fact-finding on mitigating circumstances, different from any other fact-finding they would be called upon to perform, did not require unanimous agreement of the venire before individual jurors could give it legal effect.

Finally, the manner in which the trial court explained any differences between aggravating and mitigating circumstances also led the jury to understand (incorrectly) that the unanimity requirement applied to both types of circumstances. As discussed above, when the trial court *did* distinguish between the jury's role with respect to aggravating circumstances

and its role with respect to mitigating circumstances, it was only to tell the jury that there are *different standards of proof* for each. In differentiating between the treatment of mitigation and aggravation, the trial court commented:

> The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt . . . . The defendant has the burden of proving mitigating circumstances ***but only by a preponderance of the evidence. This is a lesser burden of proof than beyond a reasonable doubt.***

N.T. 1390. The trial court's instructions made clear that this was a ***lesser*** fact-finding standard. Having been told once when there was a lesser standard, the jury would have expected to be informed *every other time* a lesser standard applied. The jury would also have reasonably assumed that if the trial court made no reference to any other lesser fact-finding standard—i.e., that not every juror need agree as to the existence of a mitigating circumstance—no such standard existed. As a result, the structure of the court's sentencing instruction—and the nature of its critical omission—reinforced the jury's misunderstanding of the unanimity requirement.

C. Summary

Counsel and the trial court explicitly and repeatedly informed the jury at the guilt stage that fact-finding was a collective function. The trial court then uniformly and repeatedly referred to the jury with the collective "you" in describing its sentencing-stage responsibilities, uniformly and repeatedly modified its description of the jury's fact-finding obligations at sentencing with the adverb "unanimously"; consistently applied the adverbial phrase "unanimously find" to clauses describing aggravating and mitigating circumstances; and never told the jury at any time that any juror who individually found a fact to be mitigating was permitted to weigh that mitigating circumstance against the aggravating circumstances

unanimously found, even if the jury did not unanimously find that mitigating circumstance. The court did distinguish between the treatment of aggravating and mitigating circumstances, but only with respect to the burdens of proof, further suggesting that they were to be treated alike in all other respects. Viewed in their totality, the court's instructions misled the jury into believing that it must unanimously find a particular mitigating factor before considering that factor in its sentencing determination. In so doing, the court's instructions created a "barrier to the sentencer's consideration of all mitigating evidence," *Mills,* 486 U.S. at 375, in violation of Appellant's Eighth Amendment rights.

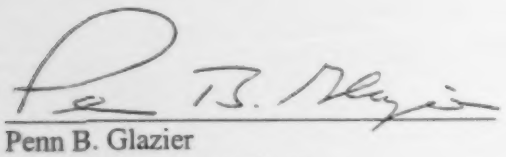
The Third Circuit properly applied *Mills, McKoy,* and *Boyde* in this case. The trial court's instructions implying that the jury must unanimously find a mitigating circumstance before it could give effect to that circumstance created a reasonable likelihood that the jury would apply the instruction in that unconstitutional manner. This clearly violated Roderick Frey's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the Court of Appeals correctly found and held that a *Mills* violation had occurred in this case.

This Court should deny certiorari in this case.

CONCLUSION

For all of the reasons presented above, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,



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